93-852

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1993

CLARK MERSHON, PAUL MERSHON &
GARY MERSHON

Petitioners,

vs.

MISSOURI FARMERS ASSOCIATION
WILLIAM BEASLEY, AND
BRIAN GRIFFITH

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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150 pp

QUESTION PRESENTED

Does the current application of F. R. Civ. P. 50 by trial and appellate courts violate the Seventh Amendment Right to Trial by Jury by permitting judges to draw their own inferences from the facts requiring this Court to reaffirm the parameters and boundaries of F. R. Civ. P. 50?

PARTIES TO THE PROCEEDINGS

The parties below were Clark Mershon, Gary Mershon, Paul Mershon, plaintiffs and cross appellants and petitioners herein; William Beasley, Brian Griffith and Missouri Farmers Association (MFA), defendants and appellants below and respondents herein.

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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Petitioners Clark Mershon, Paul Mershon and Gary Mershon hereby petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The District Court's Opinion of July 30, 1992 is set out at D1 to D43; the Order of

the Eighth Circuit ruling on the cross appeals of Petitioners and Respondents dated May 26, 1993 is set out at Exhibit C1 - C35; the order of the Eighth Circuit denying Petitioners' Petition for Rehearing and Suggestion for Rehearing en Banc dated July 30, 1993 is set out at B1 - B2 and the Judgment of the District Court entering judgment for defendants Beasley and Missouri Farmers Association is set out at A1.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1993. A timely petition for rehearing was filed, which was denied on July 30, 1993. On October 21, 1993 Justice Blackmun entered an order extending the due date for the Petition for Writ of Certiorari to and including November 29, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE, RULE AND CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

Rule 38, F.R.Civ.P. provides:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Rule 50, F.R.Civ.P. provides:

(a) Judgment as a Matter of Law.
(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, crossclaim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

* * *

(b) Renewal of Motion for Judgment after Trial; Alternative Motion for New Trial.
Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment.[1]

Section 2072, 28 U.S.C., provides with regard to the Federal Rules of Civil Procedure:

> Such rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

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[1] This is the text of the new rule effective December 1, 1991 after the trial court's ruling. However, for purposes of this Petition, the change in language is merely semantical as it does not change the intent of the rule under which the trial court ruled. Additionally, the Eighth Circuit would have ruled the case based on the language of the amended rule.

Section 1983, 42. U.S.C. provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Course of Proceedings

On November 20, 1987 Petitioners filed an eight count complaint against five defendants: Harold Kyser ("Kyser", the Bates County, Missouri Prosecuting Attorney), Hugh Jenkins ("Jenkins", the Assistant Bates County, Missouri Prosecuting Attorney), Missouri Farmers Association, Inc. (MFA), Brian Griffith

("Griffith", an in-house MFA attorney) and Bill Beasley ("Beasley" an MFA credit manager). Prior to trial Petitioners settled with Jenkins and dismissed their claims against Kyser, who died during the pendency of the action. Petitioners also dismissed several of their claims against the remaining defendants while adding another claim. Accordingly, the only claims tried were: (1) Section 1983 claims by Petitioners against MFA, Beasley and Griffith; (2) malicious prosecution claims by Petitioners against MFA; (3) libel claims by Petitioners Clark and Gary Mershon against MFA; and (4) a false arrest claim by Petitioner Clark Mershon against MFA. The case was tried to a jury from February 4, 1991 through February 14, 1991. At the conclusion of the evidence, Judge Maughmer granted MFA's motion to dismiss Clark Mershon's claim for false arrest.

The jury returned verdicts for the plaintiffs on each of the remaining counts and awarded Petitioners a total of $1,132,500. Subsequently, all parties filed timely Motions for New Trial and Judgment Notwithstanding the Verdict. On July 30, 1992, Judge Maughmer denied Petitioners' Motions and granted in part Respondents' motions by dismissing the Petitioners' 1983 claims against both MFA and Griffith leaving jury verdict of $202,500 of the verdict. A timely appeal was filed by respondents and petitioners timely cross appealed. On May 26, 1993 the Eighth Circuit Court of Appeals found for respondent Beasley and took away the remaining 1983 verdict; and in a split decision took away the malicious prosecution verdict against MFA. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Eighth

Circuit on July 30, 1993. Subsequently, a timely request for extension of time to file this brief was entered by Justice Blackmun on October 21, 1993 to file this brief November 29, 1993. Petitioners only seek review of the Eighth Circuit's failure to reinstate the verdict against MFA and Griffith and its grant of judgment to Beasley.

B. Statement of Facts

The evidence at the trial of this matter in the District Court adduced the following facts. Petitioners Clark Mershon, Paul Mershon and Gary Mershon ("Clark", "Paul" and "Gary" individually or as a group "Mershons") are fourth generation farmers who grew up on a farm and farmed with their parents. In 1985 they were farm family of the year. Since this litigation commenced in 1987 they have not farmed.

In 1983 the Mershons formed a farming partnership, Mershon Brothers Farms. That year they leased approximately 600-800 acres; 500 acres was share crop, and 300 acres was on a cash lease. They also borrowed approximately $40,000 from FHA to buy equipment, help put the crop in and pay on the cash rent leases. In 1983 they had good yields and were able to pay their expenses, including FHA.

In 1984 the Mershons farmed approximately 800 to 1,000 acres, 700 acres share crop and the remaining acres on a cash rent basis. Again they borrowed from FHA and also had a $25,000 line of credit with MFA for which they signed a note with MFA. Mershons paid back MFA in full.

In 1985 the Mershons farmed approximately 1,000 to 1,200 acres, 350 acres cash rent, the remaining acres sharecrop. They again borrowed from MFA.

During the harvest they sold some grain and received grain checks without MFA's name on the checks even though MFA was a lienholder on the grain. Gary testified that in 1985 MFA knew they were selling grain but no one from MFA ever called them and complained about MFA not getting money or their name being on the checks with the Mershons. In 1986, which was the end of the 1985 crop year, MFA was paid in full. Gary testified they were always in communication with MFA's local employees/agents, Hicks or Beasley[2] on the status of the crop.

In 1986 the Mershons intended to farm 3,000 acres but planted actually about 2,100 acres; 1,800 acres was cash rent. They signed a lease with Green Acres Farms whereby they leased approximately 2,100

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[2] In 1986-1987 William (Bill) Beasley (Beasley) was area credit manager for MFA.

acres of land for $125,000. The lease provided Green Acres would have a statutory first lien as landlord, a first security interest in all crops grown on the land and provided all checks were to be made out to W.K. Jenkins/Green Acres Farms, Inc. and Mershons until the lease was paid in full. On April 8, 1986 the Mershons signed a UCC financing statement with Green Acres giving that corporation a first security interest in all crops grown on the land. In addition the Mershons leased 412 acres (Mills farm) on a cash rent basis, and also leased land (Foreacre Farm) on a 50-50 share crop arrangement.

In 1986 the Mershons also obtained a $80,000 line of credit from MFA. Beasley had indicated to Gary there would not be a problem and even suggested they extend the line of credit to $150,000.00. Mershons signed a security agreement and a

promissory note for the line of credit. Clark testified no one at MFA informed them about how to handle the checks when they were received. Beasley admitted at trial that neither the security agreement nor the promissory note required or provided that the Mershons were to tell MFA where they sold their grain. The Mershons used approximately $64,000 of their line of credit with MFA that year.

In 1986 there was severe flooding where the Mershons farmed making it a disastrous year for the farmers. The Federal disaster program covered losses from flooding on part of the land leased from Green Acres. As a result of that the Mershons received PIK certificates. The trial court took judicial notice of 7 C.F.R. Chapter 7, the Agricultural Stabilization Conversation Services, Commodities Certificates, where it states

PIK cannot be subject to a lien. Gary testified the purpose of a PIK certificate is to pay for a disaster and to help the farmer pay expenses, such as fuel. He also testified it was his understanding that as of January, 1987, there could be no liens placed on PIK certificates. The Mershons gave some of the PIK certificates to W.K. Jenkins[3] but the remaining PIKs were used for fuel, parts and equipment; others they marketed to an elevator in Kansas City.

Gary also testified from temperature and rainfall charts submitted by MFA at trial that there were 11 inches of rain in September and October, 1986 with the first frost coming in the middle of October. At one point in November, the temperature was 11 degrees. The maturing time for milo and

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[3] W. K. Jenkins is the father of H. Jenkins, the assistant prosecutor who was a defendant in the underlying litigation.

soybeans is November. Gary testified that with the rainfall in September and October, and the low temperatures the head of the milo sprouted which was bad because no one would buy it. Gary also testified that when the temperature gets down to about 34-35 degrees, it will stunt the milo causing it to stop growing.[4] As to the soybeans, because of the weather, the bean would not harden, or form. Gary went out to the fields in October, November and December that year to look at the milo and soybeans. He observed the milo sprouting and knew it was going to be a bad harvest. Of the approximate 2400 acres planted the Mershons harvested approximately 1500 acres, the remaining acres were not worth harvesting.

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[4] Gary has taken courses in plant science, consisting of the study of roots and different types of crops grown in the midwest and other areas of the U.S.

The grain harvested had a high moisture content, giving it low value.

Most of the grain was sold in the name of the first secured creditor, W.K. Jenkins who received $119,000. W.K. Jenkins was not paid in full, however. The grain elevators issued many of the checks solely in the name of W.K. Jenkins. In addition, a crop insurance payment of $41,000 went to W.K. Jenkins. In December, 1987 Gary deposited a check made out to Mershon Brothers Farms in the amount of $1,424.91 into the Mershon Brothers account at North American Savings[5] from the sale of grain harvested off W.K. Jenkins' land and sold to Highley Grain & Feed. He then immediately informed the first secured

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5 This was the check put into evidence at the preliminary hearing by H. Jenkins.

creditor, W.K. Jenkins, the check had been deposited.

Most of the $1,424.91 was used to pay a custom combiner and the rest was used to pay for parts ($20.13), fuel for a combine ($99.70) and $163.36 for diesel fuel. Two additional checks for $426.69 and $1168.96 were also deposited in the Mershon Brothers account for grain which came off the Foreacre property. Gary testified the proceeds from those checks were used to pay custom harvesters.

The depositing of these checks and the use of the monies to pay for costs associated with harvest conformed with the Mershons' past practice with MFA of depositing the checks into the bank and then when the harvest was complete, they would write out a check to MFA. They had never deposited a check in the bank and then turned around and written out a check

for the same amount to MFA and MFA had never made this a requirement of their doing business with the Mershons. Also in years past some of the checks, despite the liens, were issued solely in the Mershon's name. Even when MFA's name was on the check MFA would sign off on the check so that the money could be used for harvest costs. Both the Mershons and Beasley testified that no one from MFA ever told the Mershons to make sure MFA's name was on all the checks which would then allow MFA to sign off only on those checks which MFA chose to sign. Beasley also testified there is nothing in MFA's credit manual which tells the credit personnel at MFA to tell farmers to have MFA's name put on the checks. There is however, in this manual a provision for MFA to notify the elevators of their security interest and this was not done by MFA. Additionally, during this

crop year MFA sent five letters to Mershons dated September, 1986, December 17, 1986, January 14, 1987, April 16, 1987, and May 15, 1987. Counsel for MFA stipulated that none of those letters made any mention that MFA's name should be on all the checks.

On December 16, 1986 Gary told Beasley they were putting all milo under commodity credit loan in ASCS and would go to Bartlett's elevator. Beasley testified that in January, 1987, MFA employees Beasley, Bennett[6], Cadle[7] and Bob Ferguson met at the home of W.K. Jenkins. At this meeting Bennett signed over to the

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6 William (Bill) Bennett (Bennett) is retail credit manager for MFA responsible for the credit department's budget and collection of accounts. He is Beasley's immediate supervisor.

7 William (Bill) Cadle (Cadle) is manager for MFA's Exchange in Butler, Missouri.

first lienholder W. K. Jenkins six to eight checks for more than $90,000 of proceeds from the Mershons' farming operation. At this meeting W.K. Jenkins continued to assert his superior lien to that of MFA, which MFA did not dispute. But although W. K. Jenkins contended the Mershons still owed him money, MFA was unable to pin him down as to the amount still owed.

Also in January, Carolyn Mershon[8] testified she received a check in the amount of $1,919.98 from Central Co-op in Adrian, Missouri for grain sold from her sons' farming operation. The check was issued in the name of Mershon Brothers, W.K. Jenkins, MFA and Farm & Home. Gary signed the check. That same morning she took the check down to W.K. Jenkins' home where he signed the check in her presence

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[8] The mother of the Mershon brothers and herself a farmer.

under Gary's signature. W.K. Jenkins did not make a copy of the check. She and her husband then took the check and went to the FHA's offices in Butler, where Thompson signed the check. They then went over to MFA's Butler Exchange and spoke with Cadle. She handed the check to Cadle, and requested MFA to release the check to pay the custom combiners. Cadle then telephoned Beasley at MFA's offices in Columbia, and told Beasley the check had been endorsed by Gary, W. K. Jenkins and Thompson. Carolyn explained to Beasley, they needed MFA to release the check to pay the custom combiners. Beasley agreed the money could be used to pay the combiners. Carolyn then observed Cadle sign the check and then she signed her name on the check. She next observed Cadle make a copy of the check on the copy machine. She asked Cadle for a copy of the check. Cadle made two

copies of the check front and back of the check. Carolyn testified Cadle did not make a copy of the check before he signed. Carolyn then took the check to North American Bank and deposited it. She retained the copy of the check in a file. About a year later she gave her copy of the front and back of the check to her sons' attorney, Howard. Howard testified when Carolyn gave her a copy of the check, it had all four signatures on it. However at trial Carolyn was presented with a check which had been presented to the circuit court at the preliminary hearing of her sons. This copy of the check did not include all of the signatures on the check.

On February 2, 1987, Beasley testified he made notes on the January 14, 1987 letter to the Mershons of a telephone conversation he had with Gary in which Gary informed Beasley the Mershons still owed

W.K. Jenkins $40,000. Gary also told Beasley at that time that the Mershons would have $30,000-$40,000 in deficiency payments (PIK) which would be available in March 1986).[9]

In the spring of 1987 Gary attended a meeting with Beasley and Bennett at MFA's offices in Columbia, Missouri at which they discussed the low yields and the expected shortfall. No one from MFA accused the Mershons of defrauding MFA at this meeting. Beasley recalled Gary mentioning the cash lease with W.K. Jenkins.

In 1986 Jenkins was President of Green Acres and also the Bates County Assistant Prosecutor. Jenkins had seen the Mershons at his father's (W.K. Jenkins) home (where

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[9] Prior to the signing of the criminal complaints in June 1987, Beasley did not investigate to see whether a security interest could be given in deficiency payments/PIK.

he was living at the time), and knew in 1987 when he was assistant prosecutor that his father (and he) had business dealings with them.

On May 15, 1987 Beasley telephoned Kyser, the Bates County Prosecutor, regarding pursuing criminal action against the Mershons based upon their selling grain and MFA not receiving any of the proceeds. At the time Beasley contacted the prosecutor's office in May, he relayed to Jenkins: (1) the Mershons had signed a security note and promissory note; (2) MFA had a security interest; (3) grain had been sold; (4) the grain proceeds were secured by a lien to MFA. Jenkins was aware, shortly after talking to Beasley, in May 1987 that part of the proceeds MFA was claiming came off of his father's land. However, at this time he did not withdraw from handling the case.

On May 22, 1987 Jenkins sent Beasley a letter enclosing three blank criminal complaints and also requested information as to the type and amount of grain sold, dates the grain was sold, and a description the property where the grain was farmed.

Beasley submitted the criminal complaints to his supervisor Bennett prior to forwarding them to Jenkins. Bennett met with his supervisor, Copenhaver, the Vice President of Retail, to discuss the Mershons' account telling him the account was past due and that criminal complaints were being signed by Beasley. When informed of this Copenhaver stated, "If we have to, we have to." Bennett further testified, that Beasley told him W.K. Jenkins had a first lien on the crops. Bennett testified MFA did not dispute W.K. Jenkins' first lien on the crops but that they never asked W. K. Jenkins to give an

accounting to them of the monies Mershons paid him. Bennett did not have any specific facts that Clark defrauded, obtained, removed and concealed property subject to a security interest. Bennett testified he knew the Mershons had sold grain but he did not consider it a crime for a MFA borrower to sell grain. Further, in 1986 he did not tell the Mershons they had to account to MFA for every place they sold grain. Bennett testified the intended result of contacting the prosecuting attorney's office about bringing the criminal charges against the Mershons was, "We felt we were getting shafted in that we were not going to get paid." Bennett authorized Beasley to sign the complaints. Beasley testified prior to signing the complaints he had obtained from his boss the authority and agreement of MFA to sign the complaints. Beasley also brought

the complaints into MFA's in-house counsel Griffith's office and Griffith asked him if the complaints were accurate. Griffith reviewed the criminal complaints prior to Beasley signing them. He looked up section 570.180 and it tracked the language of the statute. When Griffith checked the statute, he did not look at any of the cases cited after the statute, nor did he check the venue. He did not ask Beasley anything about what farm the grains came from. Griffith testified Beasley did not tell him anything about the Mershons' destroying, removing, encumbering, or transferring crops and Griffith did not ask him. He also testified, ". . .I did not elicit any facts from Mr. Beasley when he brought those complaints up to me." Beasley did tell Griffith of the conversation he had with Gary in April 1987. Griffith testified Beasley told him

the crops looked good and that he felt there should have been enough proceeds to pay MFA. When asked if Beasley told him the type of grain, where the grain was located at, or what facts he had as to the dollar amount of the property taken, or any facts as to where the fraud allegedly occurred, Griffith testified, "I don't remember." When asked "what is it that the Mershons concealed from MFA?", Griffith testified, "The grain that Mr. Beasley felt had been harvested and not turned over to MFA or an accounting had been made to MFA." The only basis for that belief was Beasley's statement he had looked at the crops in the field. Griffith did not do any investigation at the time the complaints were brought to him or any time thereafter as to whether partnership liability accrues in criminal actions. Nor did he seek the advice of MFA's general

counsel, Wayne Hoecker, as to the criminal complaints.

Griffith testified that the difference between a civil claim of conversion and defrauding a secured creditor in a criminal action is in the criminal action there is a necessity of intent to defraud-- mens rea. Griffith testified you could not defraud a secured creditor without criminal intent. Griffith testified he did not ask anyone at MFA what the facts were to support mens rea in the Mershon case.

On June 2, 1987, Beasley signed the criminal complaints against the Mershons accusing each of them with defrauding a secured creditor in violation of 570.180 R.S.Mo., a Class D Felony punishable by one to four years imprisonment. On June 3, 1987 Beasley on behalf of MFA sent a letter to Jenkins in response to the May 22, 1987 letter H. Jenkins sent to him. The only

facts that Beasley had at the time of signing the criminal complaints was that MFA had a security interest in crops sold by the Mershons. Prior to signing the criminal complaints, Beasley did not check to see how much seed or acreage the Mershons intended to plant. Even though he knew temperature and rainfall are two important elements in determining how the crops are going to turn out, he did not look up the rainfall figures or climate for Missouri for that year, nor did he ever make an inquiry of anyone at MFA of the conditions in Butler and Cass County for 1986 prior to signing the complaints. Beasley never made any investigation to determine when in fact the Mershons began to plant the crops nor the last date of planting. Beasley did not make any determination that MFA should go back and determine what the temperature and rainfall

did to the Mershons' crop in 1986 prior to signing the complaints. Beasley also did not make any determination whether W.K. Jenkins had been paid in full.

In the first part of May, 1987 Beasley sent to MFA's law department the Mershons' note for collection requesting that civil suit be filed. The same day that criminal charges were sent to the prosecutor Griffith commenced a civil suit to recover the losses on the promissory note.

Jenkins had a discussion with Beasley where it was discussed MFA was contemplating filing a civil action against Mershons. Jenkins was aware in 1986 and 1987 that if the alleged crime of defrauding a secured creditor is proven, the individual cannot discharge that particular debt in bankruptcy. Jenkins knew the $1,424.91 check came off of the land owned by the Jenkins family in Bates

County. He also had knowledge that if the first secured creditor did not file a complaint, MFA could not file a complaint because the $1,424.91 belonged to the first secured creditor W.K. Jenkins. Jenkins discussed the criminal case with his father, W.K. Jenkins when his father asked him about the case.

As to the civil claim MFA filed against Mershons, Griffith testified MFA did not add a claim for conversion, even though they could have because he chose not to do that. Griffith testified he does quite a bit of bankruptcy work and was familiar with Sections 523 and 727 of the Bankruptcy Code dealing with exceptions from discharge. He knew there was an exception to bankruptcy under section 523 for defrauding a secured creditor.

Between June and July 1987 Jenkins recalls initiating four to six telephone

calls to MFA. At trial there were documents showing telephone messages received by Jenkins' office. Jenkins testifies there are messages from MFA on 6/14/87, 6/23, 7/07, 7/26, 12/18, 1/19, 2/8, 4/4, 10/26/87, 10/29/87, 11/10/87, 11/24/87. These telephone calls are with Hoecker (additional counsel for MFA), Griffith, and Beasley.

On June 12, 1987 Griffith wrote a letter to Howard regarding the civil suit MFA filed against Mershons. In that letter he accused Mershons of converting grain. On June 15, 1987, Beasley telephoned Jenkins. Beasley's memo of this telephone conversation states:

> "6-15-87. Called Hugh Jenkins - he advised Mershons will be arraigned either next week or following week & will advise of progress. They to try to make Mershons make restitution."

On June 25, 1987 and again on August 27, 1987 the Mershons' names were published in

the Rich Hill Mining Review stating there were warrants for their arrest for defrauding a secured creditor. On July 1, 1987 Mershons filed through their counsel Howard their answer and counterclaims to the civil suit.[10] On July 16, 1987 Jenkins telephoned Beasley to tell him warrants are to be issued for the Mershons' arrest the next day. Beasley's memo of this telephone conversation states:

> "7-16-87, per Hugh Jenkins - they to issue warrants for arrest tomorrow. Requesting $10,000.00 bond. Will advise of preliminary hearing."

In July 1987 Jenkins telephoned Howard and requested Howard surrender the Mershons on a charge of defrauding a secured creditor, W.K. Jenkins, in that the Mershons allegedly cashed a PIK certificate.

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10 This case was tried in Callaway County Circuit Court on May 2-3, 1990 and resulted in a jury verdict for MFA for $94,000.00.

Howard requested Jenkins provide her with copies of the complaints and warrants, which Jenkins refused to do. Jenkins admitted at trial there were no warrants issued at this time as he had not completed his investigation. Prior to this telephone call in July, there had not been any discussions about surrendering the Mershons. This was the only conversation Howard had with Jenkins between May and October 1987 prior to the arrest of Clark. At the end of September 1987 Howard received information that there were warrants for the Mershons' arrest. Howard immediately went down to the Bates County Courthouse and found there were complaints on file signed by Beasley and warrants had in fact been issued on September 3, 1987.

On October 26, 1987 the Bates County Sheriff's Department sent a warrant to the Greeley County, Kansas Sheriff's Department

for Clark. On October 28, 1987 the Greeley County prosecutor telephoned Clark at the Tribune, Kansas High School where he was employed as a teacher. The prosecutor told Clark to report to his office immediately. Clark immediately left school and went to the prosecutor's office. At the prosecutor's office, he was handed the warrant for the complaint signed by MFA and was told there was a warrant for his arrest. Clark reported to the Greeley County law enforcement authorities. He was not permitted to leave until a formal agreement was made as to his arrest. He signed an appearance bond agreeing to appear at that court and he was then released.

After the arrest of Clark, Howard in October, 1987 contacted Griffith to ask him why MFA caused the criminal complaints to be issued. Griffith stated to Howard MFA

filed criminal charges to preserve an exception to discharge should the Mershons file for bankruptcy. Griffith also stated to Howard that "restitution would appease the prosecutor."

In November 1987 Paul had a telephone conversation with Bennett in which Bennett told him that if restitution was paid to MFA, MFA would have no interest in the criminal charges and would help in getting the criminal charges dropped. Bennett testified, "I told him if it was paid, we would have no interest in that action down there." On November 20, 1987 the Mershons filed the present action seeking relief pursuant to 42 U.S.C. 1983 and Missouri common law. On November 24, 1987 Clark appeared at the Greeley County Courthouse before the Greeley County Magistrate who conducted preliminary proceedings pertaining to Clark's extradition. At this

hearing Clark waived extradition and agreed to surrender himself to the Bates County law enforcement authorities. Clark was released on a recognizance bond. I n December, 1987 Gary and Paul voluntarily surrendered themselves to the Bates County law enforcement authorities. A hearing was held and they were released on a signature bond.

In December, 1987 Griffith sent a letter to Kyser and Jenkins enclosing the security documents executed by the Mershons.

After the Mershons appeared for bond hearing, Howard filed a Motion to Disqualify Jenkins from handling the Mershon matter because of his interest in the case.[11] Jenkins refused to

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11 Not only did H. Jenkins possibly stand to gain financially but he had been sued in federal court under Sec. 1983 at this point in

withdraw from the criminal case[12] until Judge Barnes informed him Howard's Motion to disqualify had merit and he was going to entertain the motion. Jenkins withdrew when he "got the drift that I was going to be kicked off the case." Jenkins did not want to withdraw because in his words "If I had been disqualified by the judge, then I would've lost any control to see that this case was pursued to any extent."

On February 28, 1988 a preliminary hearing was held in Henry County. The Mershons were represented by Howard; Kyser

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time.

12 The Eight Circuit incorrectly states that after Jenkins removed himself from the case, the State attorney general's office pursued the matter; but, Jenkins testified the case was not pursued by the state. Further, when the state nolle prosequied the charges, it was done at the state's costs.

and Jenkins represented the state.[13] Jenkins testified at trial Kyser appeared at the hearing without compensation to make sure the Mershons were bound over at the preliminary hearing because he had been sued in federal court by the Mershons.

Jenkins put into evidence at the hearing: (1) $1,424.91 check, (2) signature cards from an account in Harrisonville where the money was deposited; (3) testimony by MFA employees that G. Mershon said $30,000 of crops were sold; (4) "expert" testimony of Cadle who went out and saw the crops; (5) MFA employee Dan Chastain who saw crops being harvested and followed one of the trucks to an elevator and (6) the $1,919.98 whited

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13 Kyser had resigned from his position as prosecuting attorney by this time. He assisted H. Jenkins. He was also a defendant in the 1983 action at the time of the hearing.

out check given to Jenkins by MFA. This check had two of the endorsers' names whited out--those of MFA and W.K. Jenkins. In fact, the check had actually been endorsed by all the payees as Carolyn testified at trial. Cadle testified at the preliminary hearing, however, it was a true and correct copy, when it was not. The trial court allowed this evidence to show there was joint activity of MFA with Jenkins.

MFA employees Griffith, Cadle, Bennett, Beasley and Chastain attended the preliminary hearing. Griffith was sitting with Jenkins and Kyser at counsel table during the hearing even though he admitted at trial he had no reason to be there. During this hearing MFA testified <u>on projected crop yields rather than actual crop yields</u>. Beasley and Cadle testified falsely during the preliminary hearing that

Mershons had an "average crop". Both men were aware at all times that the Mershons' crops were planted later and were in poor condition and that yields were very low.

During trial however, Beasley testified that on July 30, 1986 he viewed the crops in Bates County and in a memo to his supervisor Bennett said that the beans were infested with broadleaf weeds; 160 acres of milo looked good, but the remaining 600 acres of milo were in fair to poor condition. On July 31, 1986 he viewed the crops on W.K. Jenkins' ground--160 acres of beans in good condition; on Foreacre's farm he viewed 80 acres of milo and 20 acres of beans in fair to poor condition and on the Mills farm, 460 acres of milo in good condition. Beasley also testified at trial that on December 18, 1986 he viewed the crops with Cadle. He could not recall whether or not he got out

of the car in December. Beasley testified, "Well, ma'am, I had driven by and had looked at the crop. And just ball parkin' it, it's what you call windshieldin'. Beasley admitted that by eyeballing crops from a vehicle he could not tell how many acres were planted. Beasley also testified that he had problems seeing--during trial he testified he could not see a chart 20 feet away. Prior to the preliminary hearing, Beasley testified he did not recall whether he made any calculations as to specific yields. He also testified he never made any calculations as to what was planted based upon the seed purchased.

Cadle testified at trial that in August, 1986 he and Beasley had looked at soybeans and milo. Cadle did not know the maturity rate on the crops nor did he know whether Mershons planted rowed or drilled beans. Cadle observed the milo was not at

the normal stage of maturity and the milo was damaged. The crop was late, weed infested and not at the normal stage of maturity. In December, 1986 Cadle once again looked at three of the Mershons' fields. He did not make any projected yields because the crops was planted late and both he and MFA were concerned it might not be a good yield and there was going to be a shortfall. He discussed this with Beasley at the time he and Beasley were looking at the Mershons' fields. At the preliminary hearing, however, Cadle testified the soybeans the Mershons planted were rowed. This was false. Gary testified they had planted drilled beans. Cadle did not know when Mershons planted or the type or amount of grain actually harvested. In fact, he was not even assigned to MFA's Butler Exchange until August 1986. Cadle did not know the rate

of seed beans per acre Mershons planted.

In 1986 Chastain was an MFA employee. He testified in December, 1986 he observed a custom crew harvesting 80 acres of soybeans for the Mershons. He followed a grain truck driven by a custom cutter. He testified he saw a grain truck driven by Paul to Central Cooperative in Adrian, Missouri. At the time this incident allegedly occurred, Paul was working in Kansas City. Clark testified by October 1986 that Paul was working in Kansas City and was not there for harvest.

After the preliminary hearing, Carolyn went to Columbia and had a conversation with Bennett, Beasley and Griffith. During this conversation, Carolyn testified she was told by MFA employees that "if the boys would make restitution, they would drop the criminal charges - or drop the charges for their arrest." She further testified they

were talking in terms of money, of paying the amount on the note owed. A few days after speaking with MFA, she went down to speak with Jenkins at the Bates County Prosecuting Attorney's office. Jenkins told her he could not drop the charges unless MFA agreed to drop them.

The Mershons filed a motion for speedy trial in March 1988. More than two and a half years later in June 1990 the State Attorney General's office filed dismissals (nolle prosequi) and the criminal charges were dismissed with prejudice at the state's costs.

During trial the Mershons attempted to offer evidence that MFA President Bud Frew ratified the actions of his employees; Mershons also attempted to offer evidence that MFA had engaged in a pattern and practice of seeking criminal prosecution against other defaulting debtors or that

the county prosecutor had filed criminal charges in the past against other debtors who had defaulted on loans from MFA. All such evidence was rejected by the trial court. As in the instant case MFA had civil cases on file for collection with those other defaulting debtors. Griffith was involved in all three cases while Beasley was involved in an additional case. MFA in all cases claimed the borrowers sold grain, received checks with MFA's name on the checks and cashed the checks. All three cases were brought at approximately the same time as the Mershons' case.

REASONS FOR GRANTING THE PETITION

Petitioners claim both the trial and appellate Courts substituted their version of "reasonable facts" for that of the jury. This Petitioners claim contravenes all standards for grant of Judgment

Notwithstanding the Verdict set forth in Dace v. ACF Industries, Inc., 722 F.2d 374 (8th Cir. 1984), Gilkerson v. Toastmaster, Inc., 770 F.2d 133 (8th Cir. 1985) and Hauser v. Kubalak, 929 F.2d 1305 (8th Cir. 1991) and in seminally in Berry v. U.S., 312 U.S. 450 (1941) thereby depriving Petitioners of their Seventh Amendment Right to Trial by jury.

While paying lip service to the standard --"as a matter of law"--, in reality both the trial court and appellate court's opinions are replete with reference to continual "quantifying and qualifying" of the evidence, a clear and unequivocal jury function. The Eighth Circuit's opinion is replete with statements such as "We do not believe . . allows the inference", "We consider extremely attenuated. . ."; "Any inference of a mutual understanding . . . , in our view";

and, most telling ". . . but the inferences that the Mershons press on us are not plausible". By so doing, the court has engrafted its judicial perspective of "reasonableness" onto the facts rather than permitting the jury to shape the factual parameters of the case. The end result of this tampering with the jury's fact finding process is to permit a trial or appellate court to expand, or in this case limit, the factual contexts in which a claim may be brought. This process necessarily results in the demise of a meaningful trial by jury, but more importantly eviscerates the "precedential" value of cases reviewed under this standard. Because of the negligible case law on this Standard of Review since Berry and the increasing use of F. R. Civ. P. 50 by trial and appellate

courts to overturn jury verdicts,[14] Petitioners submit this case is worthy of this Court's review so that a meaningful standard of review is developed by the courts which preserves individual rights to trial by jury. As Justice Rehnquist observed in his dissent in Parklane Hosiery v. Shore, 439 U.S. 322, 344 (1979) the Seventh Amendment was adopted because the framers knew that "[a] jury would reach a result that a judge either could not or would not reach."

As recently as this Court's November 9, 1993 decision in Harris v. Forklift Systems, Inc., 1993 WL 453611

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[14] In 1985 the Federal Courts of Appeals reversed a challenged verdict in whole or in part in 105 cases representing fully 45 percent of the cases presented. The reversal rate for noncommercial cases was over 57 percent with reversals of constitution and discrimination matters representing 55 and 52 percent respectively.

(U.S.), Justice Scalia lamented the vagueness of the "reasonable person" standard in permitting juries to wander "unguided".[15] Petitioners here lament that the standard utilized by both trial and appellate court's in granting Judgment Notwithstanding the Verdict is just as "unguided" but here with the result of usurping individual's Seventh Amendment Rights to Trial by Jury.

We do not suggest to this Court that F. R. Civ. P. 50 takes away from juries and gives to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact--a jury being the constitutional tribunal provided for trying facts in our courts of law. [See Berry v. United States, 312 U.S. at 452-53]

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15 See Slip Opinion 1993 WL 453611 (U.S.), Concurring Opinion of Justice Scalia at p. 5.

However, we do suggest that because the standards of F. R. Civ. P. 50 have become so unclear that the line is frequently crossed by both trial and appellate judges who increasingly no longer represent the common sense of the community which juries represent. What is a reasonable inference to the community and one "[that] is capable of bridging many gaps" (Galloway v. United States, 319 U.S. 372, 386 (1943) often is not "reasonable" to trial and appellate courts who consequently substitute their inferences for those of the jury. Although this may be appropriate where there is an absence of proof which might give rise to pure speculation thereby demanding the entry of Judgment Notwithstanding the Verdict for defendants, increasingly it is used by trial and appellate judges where there is proof. The essential of the standard must be, however,

that all possible inferences favoring the party whose case is attacked must be given by a trial or appellate court in an F. R. Civ. P. 50 Motion, or review of the denial of such a motion at the appellate level. By inserting the word "reasonable" instead of "possible" we insert a "subjective" standard--even if the standard is one of "objective reasonableness"-- that has become impossible of ascertainment and varies from one panel of judges to another. Clearly it is one thing for a trial or appellate court to say there is no evidence from which any inference can be drawn, and quite another for there to be evidence from which persons (reasonable or not) might differ as to the inferences to be drawn. To say that the inferences drawn were "unreasonable" is to assume that somehow the jury which was found to be qualified suddenly became unqualified to make

"reasonable" inferences.

The dissent in Galloway supra at 396 et seq. explores at length the problems inherent in such findings by trial or appellate courts. At the time of their dissent, the Federal Rules had been extant for a mere six years and perhaps the import of F. R. Civ. P. 50 was not clearly defined as yet. But that dissent clearly foretold the evolution of F. R. Civ. P. 50 since that time into a rule which clearly eviscerates the Seventh Amendment and particularly in constitutional or discrimination cases. After almost fifty years the dissent of Galloway needs to be revisited in the context of the 1991 version of the rule to ensure that "reasonableness" is not a totally subjective standard permitting trial and appellate courts a roving commission to "reexamine testimony, weigh conflicting

evidence, and take the case from a jury forever". Id. at 397.

Revisiting this standard will not take from the judiciary control of the jury function for that power still resides in a trial court's power to order a new trial. Id. at 400 (citing to Alexander Hamilton in The Federalist). Likewise, if the judiciary believes there are insufficient facts to go to the jury, then the tool of summary judgment available under F. R. Civ. P. 56 is available to prevent a trial. Unfortunately what has evolved is that increasingly although defendants utilize F. R. Civ. P. 56, trial courts do not rule the motions but take them with the case apparently waiting to see if a jury agrees with their analysis of the facts. If the jury does not, then Judgment Notwithstanding the Verdict is granted.

However, a more appropriate use of F. R. Civ. P. 50 and 56 would be for the trial court to rule the sufficiency of the evidence under F. R. Civ. P. 56 and then if proof is not adduced on the facts which supported the denial of the F. R. Civ. P. 56 motion, than Judgment Notwithstanding the Verdict would-- appropriately --be granted for insufficiency of evidence. However, as the two rules have evolved increasingly Judgment Notwithstanding the Verdict has become a tool for reweighing the evidence and drawing inferences from evidence which on summary judgment would have been sufficient to go to a jury.[16]

As the detailed fact excerpt from the trial record demonstrates there was more

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16 This case as one in which summary judgment was filed by the defendants but was taken with the case by the trial court as were the motions at the close of the evidence.

than ample evidence from which a jury could draw reasonable inferences that MFA and Beasley intentionally and knowingly engaged in a scheme to use the criminal processes to force payment of a civil debt in violation of the Petitioners' civil rights. This was clearly part of a larger pattern on the part of respondents to defeat defaulting farmers' attempts to take bankruptcy from the crushing debt resulting from a disastrous farming year in 1986.

However, the Eighth Circuit, like the trial court below, in reviewing the facts adduced at trial did not permit the jury to draw its inferences from the facts, but substituted its own inferences and factual determinations, sometimes without any support in the record, to find for the respondents. This, Petitioners contend, is the result of the evisceration of the rule in recent years that disputed issues of

fact are for the jury's determination if reasonable men could differ. "Reasonable men" does not necessarily mean "reasonable judges" as often a judiciary appointed for life and attached at the hip to the sovereign may have very different views of life than that of the common citizen caught up in life's daily viscidities. That is not to say that the judiciary is not "reasonable" only that the judiciary's view of "reasonable" and that of the men and women of a jury may vary considerably. In reaching what is "reasonable" the judiciary should not and cannot weigh conflicting evidence and judge credibility. Rather the focus should be on whether there is <u>any</u> evidence from which a jury could draw inferences.

Turning to the facts of this case adduced at trial and set out in detail in the statement of facts, it is clear that

both the trial court and Eighth Circuit's opinions go to great lengths to support respondents' positions without regard to the inferences which the jury clearly found. This despite the fact that in many ways this case is akin to the factual analysis of Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) which this court remanded for trial on the merits after a grant of summary judgment by the trial court affirmed by the appellate court.

Additionally, when the opinions of the trial court and Eighth Circuit are looked at in light of the factual record it is even more clear that both courts under the guise of evaluating "sufficiency of the evidence", picked the evidence which supported their position while ignoring the rest and remainder of the evidence which supported the jury's decision. One egregious example of this is the Eighth

Circuit's finding that Petitioners had no intent to pay MFA while ignoring the evidence that they clearly did not have the funds to pay MFA! Another example, is the finding that there was no pattern and practice to establish liability against MFA while ignoring that the trial court refused to accept evidence of pattern and practice even though an offer of proof was made by Petitioners.

The question presented is not an easy one to answer. But failure to address the issue has left the door increasingly open for trial and appellate courts to use F. R. Civ. P. 50 to wrest from the jury its fact finding role thereby eating away at the Seventh Amendment. Petitioners request this Court take this case to restate the rule in clear and unequivocal terms that appellate courts must constantly have in

mind that their function is not to decide factual issues de novo.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit or, the Court may wish to consider reversing the judgment summarily, or alternatively, this court upon a review of the facts and law should remand this matter for a new trial on Petitioners' 1983 claims against Beasley, Griffith and MFA for the reason that Judgment Notwithstanding the Verdict was incorrectly entered.

Respectfully submitted,

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Attorneys for Petitioners

November 29, 1993

APPENDIX A

Order of the United States District Court For The Western District of Missouri, Western Division

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CLARK MERSHON, et.al. 87-1011-CV-W-BB

Plaintiffs,

v.

MISSOURI FARMERS ASSOCIATION,
INC., et.al.

Defendants.

Order Filed October 21, 1993

Pursuant to the opinion and mandate of the Eighth Circuit Court of Appeals, it is ORDERED that judgment is entered in favor of defendants William R. Beasley and Missouri Farmers Association, Inc. on all claims.

/s/
John T. Maughmer
Chief,
United States Magistrate Judge
Kansas City, Missouri

APPENDIX B

Order of the United States Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2866/2958WMKC

Clark Mershon et. al.

Appellees,

vs.

William R. Beasley, et. al.

Appellants.

Order
Denying Petition for Rehearing and
and Suggestions For Rehearing En Banc
Entered July 30, 1993

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion.

The petition for rehearing is also denied. Judge Floyd R. Gibson would grant the petition.

Order Entered at the Direction of the Court:

/s/

Michael E. Gans, Clerk,
U.S. Court of Appeals,
Eighth Circuit

APPENDIX C

Order of the United States Court of Appeals For The Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2866

Clark Mershon, Gary Mershon,
and Paul Mershon,

Appellees,

v.

William R. Beasley, Individually, and
Missouri Farmers Association, Inc.,

Appellants.

Appeals from the United

States District Court for the Western
District of Missouri.

No. 92-2958

Clark Mershon, Gary Mershon,
and Paul Mershon,

Appellants,

v.

Brian Griffith Individually
and Missouri Farmers Association,
Inc.,

Appellees.

Submitted: March 17, 1993
Filed: May 26, 1993

Before Bowman, Circuit Judge, Floyd R. Gibson, Senior Circuit Judge, and Morris Sheppard Arnold, Circuit Judge

Morris Sheppard Arnold, Circuit Judge.

Between 1983 and 1987, brothers Clark, Paul, and Gary Mershon farmed as a partnership in Bates County, Missouri. During that time, they borrowed money through a line of credit with the Missouri Farmers Association (MFA). The loan was secured by a lien on the crops to be harvested by the Mershons. In mid-1987, after learning the Mershons had deposited directly into their personal bank account a check from a buyer of some of their crops the MFA filed a civil suit against the Mershons

in state court to collect on the outstanding loan (the MFA won this suit in May, 1990).

At the same time that the state court civil suit was filed, the MFA made a criminal complaint against the Mershons, alleging that they had defrauded a secured creditor, namely the MFA, The county prosecutor subsequently initiated criminal proceedings against the Mershons. Shortly thereafter, the Mershons filed a civil suit against the MFA and several individuals in federal court, seeking damages under state and federal law; the Mershons also sought an injunction against the state criminal action. The federal court denied the injunction; that denial was upheld on appeal. See Mershon v. Kyser, 852 F.2d 335 (8th Cir. 1988) (per curiam).

In early 1988, the Mershons appeared for a preliminary hearing on the state criminal charges. The state court found probable cause for prosecution. In late 1989, the county prosecutor withdrew from the criminal action, but the case was pursued by the state attorney general's office. In mid-1990, the state attorney general's office dropped the criminal charges against the Mershons.

The Mershons' federal civil suit came to trial in early 1991; by that time, the relevant claims were malicious prosecution and libel under state law (against the MFA) and conspiracy to deprive the Mershons of certain federal constitutional rights under 42 U.S.C. Section 1983 (against the MFA; William Beasley, the MFA credit manager; and

Brian Griffith, an MFA in-house lawyer). After an eight-day trial, a jury found for the Mershons on all claims. In mid-1992, the trial court granted a judgment notwithstanding the verdict (JNOV) to the MFA and Mr. Griffith on the Section 1983 claim; in the event of reversal on that order, the trial court granted those two defendants a new trial on that count. The trial court left in place verdicts against the MFA malicious prosecution and libel under state law and against Mr. Beasley under Section 1983. Both sides appeal.

The MFA and Mr. Beasley appeal on five grounds -- that the evidence was insufficient on all three counts with respect to conduct by them that reflected the lack of a reasonable belief that the Mershons had committed

a crime; that the evidence was insufficient to prove a conspiracy between Mr. Beasley and the county prosecutor to deprive the Mershons of federal constitutional rights; that the evidence was insufficient on malicious prosecution in that the Mershons did not prove that testimony at the state probable cause hearing was false and that they prevailed in the state criminal action; that the libel count was based on privileged statements and was therefore, as a matter of law, not actionable; and that the trial court abused its discretion in denying the new trial to the MFA on the state law claims and to Mr. Beasley on the Section 1983 claim.

The Mershons cross-appeal on two grounds -- that the trial court was

wrong in granting a JNOV to the MFA and Mr. Griffith on the Section 1983 claim, and that the trial court abused its discretion in granting a new trial to the MFA and Mr. Griffith on that claim in the event of reversal as to the JNOV.

Because we hold, for the reasons stated below and after reading the entire trial transcript, that none of the three claims should have been submitted to the jury, we reverse the judgment below and remand case for the entry of a judgment in favor of the defendants on all claims.

I.

Mr. Beasley argues that the evidence was insufficient to show any agreement between him and the county prosecutor on a common goal of depriving the Mershons of federal constitutional

rights, and therefore that he was entitled to a directed verdict or a JNOV on the Section 1983 claim. (According to the trial court, the right in question was a fourth amendment guarantee of freedom from unreasonable seizure, criminal prosecution to collect a disputed civil debt being considered a sort of constructive seizure because of the restraining effect of a pending prosecution on a criminal defendant's freedom to go where he pleases.) In its order denying a JNOV to Mr. Beasley on this issue, the trial court referred to evidence that the county prosecutor was the son of a "substantial client" of the MFA. that the county prosecutor himself was an officer of a corporation that did "considerable business with [the] MFA," that multiple communications had taken

place between Mr. Beasley and the county prosecutor, and that a check that implicated the Mershons at the state probable cause hearing had been altered by another employee at the MFA. The trial court concluded that "the totality of the evidence" established a submissible case on Mr. Beasley's alleged conspiracy with the county prosecutor. We disagree.

It is well settled that a private party may be held liable on a Section 1983 claim if "he is a willful participant in joint action with the State or its agents." Dennis v. Sparks, 449 U.S. 24, 27 (1980). In construing that test in terms of the allegations necessary to survive a motion to dismiss, this circuit has held that a plaintiff seeking to hold a private

party liable under Section 1983 must allege, at the very least, that there was a mutual understanding, or a meeting of the minds, between the private party and the state actor. See, e.g., Smith v. Bacon, 699 F.2d 434, 436 (8th Cir. 1983) (per curiam); see also Holbird v. Armstrong-Wright, 949 F.2d 1019, 1020 (8th Cir. 1991). (per curiam); Deck v. Leftridge, 771 F.2d 1168, 1170 (8th Cir. 1985) (per curiam); and White v. Walsh, 649 F.2d 560, 562 (8th Cir. 1981). In order to survive a motion for summary judgment or for a directed verdict, evidence must be produced from which reasonable jurors could conclude that such an agreement was come to. See e.g., Moore v. City of Paducah, 890 F.2d 831, 834-35 (6th Cir. 1989); Gramenos v. Jewel Companies, Inc., 797 F.2d 432, 435

(7th Cir. 1986). cert. denied, 481 U.S. 1028 (1987); Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1352-53 (7th Cir. 1985); and Fonda v. Gray, 707 F.2d 435, 438 (9th Cir. 1983).

The jury instructions in this case stated that in order to find Mr. Beasley liable on the Section 1983 claim, the Mershons had to prove that Mr. Beasley was "jointly engaged" with the county prosecutor "to violate plaintiffs' civil rights." We express no opinion with respect to whether this was an adequate formulation of the required proof. After reading the trial transcript, however we are convinced that the evidence was insufficient as a matter of law on the question of a mutual understanding, or a meeting of the minds, between Mr. Beasley and the

county prosecutor and therefore that the section 1983 claim against Mr. Beasley should not have been submitted to the jury.

It is undisputed that there were multiple contacts between Mr. Beasley and the county prosecutor, both by phone and by letter. The MFA was, however, the complaining party in the criminal case. We do not believe that the fact of these contacts, by themselves and without more, allows the inference that Mr. Beasley and the county prosecutor ever reached any mutual understanding that the MFA would use the criminal process for the purpose of collecting its civil debt. The Mershons offered no evidence, for example, that the MFA had sought criminal prosecution of other defrauding debtors in the past or,

indeed, that the county prosecutor had filed criminal charges in the past against other debtors who had defaulted on loans from MFA. See, e.g., Gramenos, 797 F.2d at 436.

The Mershons' theory as to why the county prosecutor would agree to misuse the power of his office seems to have been that a criminal conviction of the Mershons would have precluded the discharge in bankruptcy of the debt to the MFA that was secured by the crops sold, that the county prosecutor and his father were owed a debt that was secured by the same crops, and that a criminal conviction of the Mershons would therefore generate a similar exception to bankruptcy discharge of the debt owed to the county prosecutor and his father. We express no opinion on the accuracy of

the Mershons' belief about the effect of a criminal conviction on the ability to discharge a debt in bankruptcy. We consider extremely attenuated, however, any connection, based on this theory, between the decision to prosecute and the personal benefit that the county prosecutor might have realized from pursuing the criminal action against the Mershons. Any inference of a mutual understanding that would be drawn from this tenuous connection between the county prosecutor and Mr. Beasley, in our view, could be the result only of "mere conjecture and speculation, "Moore v. City of Paducah, 890 F.2d at 834.

A party may not cry 'conspiracy' and throw himself on the jury's mercy. ... There must be a genuine issue about a material fact. ... Plausible

inferences must be resolved in favor of [the Mershons], but the inferences [that the Mershons] press [] on us are not plausible." Gramenos, 797 F.2d at 436. Under the circumstances of this case, we hold that the trial court should have granted Mr. Beasley's motion for a directed verdict or for a JNOV on the Section 1983 claim. See e.g., Moore v. City of Paducah, 890 F.2d at 834-35; Gramenos, 797 F. 2d at 436; and Moore v. Marketplace Restaurant, Inc., 754 F.2d at 1352-53. For similar reasons, we hold that the trial court was correct in granting a JNOV to the MFA and Mr. Griffith on the Section 1983 claim.

II.

In order to prevail on a malicious criminal prosecution claim under Missouri law where the plaintiff was

actually bound over after a state court preliminary hearing, the plaintiff must prove that the defendant initiated a criminal proceeding that was resolved in favor of the plaintiff, that the defendant acted primarily for a purpose other than that of bringing an offender to justice, that the defendant acted without probable cause, that the probable cause determination reached at the state court preliminary hearing was procured by false or fraudulent testimony, and that the plaintiff was damaged as a result. See MAI Section 23.07 (1991); see also Sanders v. Daniel International Corp., 682 S.W.2d 803, 807, 814 n.4 (Mo. 1984) (en banc), and Kvasnicka v. Montgomery Ward and Co., 166 S.W.2d 503, 515 (Mo. 1942).

The MFA challenges the verdict

against it on the Mershons malicious prosecution claim in two respects -- first, on the sufficiency of the proof as to the use of false or fraudulent testimony to procure the probable cause determination at the state court preliminary hearing and, second, on the question of whether the state criminal prosecution was resolved in favor of the Mershons. The MFA argues that it was entitled to a directed verdict or a JNOV on the malicious prosecution claim because of insufficient evidence with respect to either or both of these elements of the claim.

In its order denying a JNOV to the MFA on this issue, the trial court stated only that "the plaintiffs made a submissible case that the probable cause determination was procured by false or

fraudulent testimony" and did not specify the evidence that created a submissible case. We disagree, with respect to the question of the use of false of fraudulent testimony at the state court preliminary hearing, that the evidence was sufficient to establish a submissible case on the malicious prosecution claim.

The Mershons argue that the MFA's intent at the state court preliminary hearing was to "create the false impression that the [secured] crops were good and could and did yield more money than they actually did." The Mershons contend, therefore, that the MFA either acted primarily for a purpose other than that of bringing an offender to justice, or acted without probable cause, or both. We express no opinion on the

merits of that argument. We note, however, that even if the Mershons are correct in those regards, they still had to prove, in order to prevail on the malicious prosecution claim, that the probable cause determination reached at the state court preliminary hearing was procured by false or fraudulent testimony. See MAI 23.07 (1991); see also Kvasnicka, 166 S.W.2d at 515. On this question, we believe, they failed to establish a submissible case.

At trial, the Mershons offered four instances of allegedly false testimony or fraudulent evidence given at the state court preliminary hearing -- a check implicating the Mershons that had allegedly been altered by an employee of the MFA; statements by Bill Cadle, and MFA employee, first, that the Mershons'

crops had been planted by rows rather than through drilling and, second, that he had viewed the Mershons' crops and had found them to be plentiful; and a statement by Dan Chastain, another MFA employee, that Paul Mershon had been seen taking some crops to a grain elevator at a time when Paul Mershon was not even working on the Mershons' farms. The trial court specifically instructed the jury that the evidence as to the allegedly ~~altered~~ check could not be considered on the question of whether false or fraudulent testimony was offered at the preliminary hearing. The trial court further held, as a matter of law, that no evidence existed to show that the alleged alternation of the check in question affected the state court's finding of probable cause. We

turn, then to the three remaining statements cited by the Mershons.

The significance of a statement that the Mershons' crops were planted by rows rather than through drilled sections is apparently that crops planted by rows require less seed. Any estimate of yield extrapolated from the amount of seed initially purchased (and presumably planted) by the Mershons, then, would be higher if assumed to be derived from rowed crops rather than drilled ones. The Mershons contend that when the MFA calculated their presumed income from crops planted by rows, the amount estimated, and thus the amount unaccounted for to the MFA, was far too high.

We have read the transcript of the state court preliminary hearing. We do

not see the relevance of this argument, given the undisputed facts that the Mershons did sell some crops yet never paid anything toward their debt to the MFA. Even if Mr. Cadle's testimony in this respect could be considered false or fraudulent, we hold that it could not have been material to the state court's finding of probable cause that the Mershons had sold secured crops with the intent not to repay the MFA for the loan given to them.

Nor do we find material the question of Mr. Cadle's opinion that the Mershons' crops were "good," "average," or "normal," as he characterized those crops during the state court preliminary hearing. Because the Mershons do not dispute that they sold some crops and that they never paid anything to the MFA

on their debt, Mr. Cadle's opinion could not have been material to the state court's finding of probable cause.

Finally, we fail to see the materiality of any question relating to whether Paul Mershon was observed taking some crops to a grain elevator at a time when he was not even working on the Mershons' farms. In the first place, the transcript of the state court preliminary hearing actually reflects that the testimony was that Paul Mershon was observed planting crops, not harvesting them or transporting them. Even if the testimony had been as the Mershons' contend, however, it could not have been material to the state court's finding of probable cause, given the Mershons' own acknowledgement that they sold some of the secured crops yet never

paid anything to the MFA.

We hold that as to the question of whether the state court's probable cause determination was procured by false or fraudulent testimony, the evidence was insufficient to establish a submissible case. The trial court should, therefore, have granted a directed verdict on the malicious prosecution claim.

III.

The basis of the libel claim as it was submitted to the jury was that the MFA (through Mr. Beasley) signed a criminal complaint against the Mershons that contained false statements, and that the MFA either knew that the statements were false or recklessly disregarded whether the statements were false "at the time when [Mr.] Beasley

had serious doubt as to whether [the statements were] true." On appeal, the MFA argues that the statements in the criminal complaint were absolutely privileged under Missouri law since they were relevant to the state court proceeding on the criminal charges.

The Missouri courts have adopted a rule of absolute privilege for witnesses testifying in a judicial proceeding. See, e.g., Wright v. Truman Road Enterprises, Inc., 443 S.W.2d 13, 15 (Mo. Ct. App. 1969). This immunity extends to statements made "'preliminary to a proposed judicial proceeding.'" Id. at 16, quoting Restatement of Torts Section 588, now Restatement (Second) of Torts Section 588 at 250, (1977). In our view, then, Mr. Beasley's statements in the criminal complaints were

absolutely privileged under Missouri law. See also Restatement (Second) of Torts 587 at 248, Section 587 comment b at 249, Section 598 comment e (1977). Since the only basis for the libel claim was the criminal complaint, the MFA was entitled to judgment as a matter of law on this issue.

IV.

For the reasons stated, we reverse the judgment below and remand the case for the entry of a judgment for the defendants on all claims.

FLOYD R. GIBSON, Senior Circuit Judge, concurring in part and dissenting in part.

I concur with the majority insofar as it affirms the district court on the

issues raised in the Mershons' cross-appeal. I also agree that the statements made at the preliminary hearing are absolutely privileged under Missouri law, hence I concur in part III of the majority's opinion. However, I would affirm the district court on the Section 1983 and malicious prosecution claims, and therefore I dissent from parts I and II of the majority's opinion.

I. SECTION 1983 CLAIM

I am in substantial agreement with the majority's characterization of the law regarding the imposition of Section 1983 liability on purely private actors. However, my reading of the record convinces me that there was sufficient evidence to permit the jury to find

Beasley and Hugh Jenkins acted in concert. First the majority downplays the potential personal benefit to the prosecutor; after all, he did have an interest in a company to which the Mershons owed money. Second, the Mershons' attorney testified MFA's attorney told her one of the reasons the criminal prosecution was being pursued was "to preserve an exception to discharge in bankruptcy." This same MFA attorney joined Jenkins at the counsel table during the preliminary hearing and, by his own admission, really had no purpose for being there. I believe that it was entirely reasonable for the jury to infer that Beasley and Jenkins both wanted to obtain the criminal conviction in order to protect their individual monetary interests.

The second, and perhaps more fatal, shortcoming in the majority's analysis is that it does not discuss the Mershons' second contention: that the criminal proceeding was filed to coerce payment of the civil debt. Several witnesses testified Beasley told them the charges would be dropped if the Mershons' debt were paid. Furthermore, Beasley made a note memorializing a telephone conversation with Jenkins stating that Jenkins would "try to make Mershons make restitution." This, in combination with Jenkins testimony that using his position as prosecutor to collect a debt would be "illegal" and "improper," could have properly formed the basis for the jury's decision. Finally, the jury might have been convinced that prosecutor Jenkins was

not acting wholly out of a desire to enforce the law when he conceded that he called the Mershons' attorney and suggested she surrender her clients because warrants would be issued for their arrest, even though his investigation had not yet been completed. In short, I think when the evidence is viewed in a light most favorable to the Mershons, a reasonable jury could have found Jenkins and Beasley jointly pursued the prosecution for improper and illegal reasons. I would not disturb the jury's verdict in this regard.

II. MALICIOUS PROSECUTION

I dissent on this count because, in my opinion, the majority places too much emphasis on the need for false or fraudulent testimony. I believe the

majority mischaracterized Missouri law when it implies that an element of malicious prosecution is that "the probable cause determination reached at the state court preliminary hearing was procured by false or fraudulent testimony." Ante at 7. The Missouri Supreme Court has set forth six elements of the cause of action, none of which required the state court determination be procured by false testimony. Sanders v. Daniel Inter'l Corp., 682 S.W.2d 803, 807 (Mo. 1984) (en banc); see also MAI Section 23.07 (1991). One of the elements does require that the defendant acted without "reasonable grounds," id. at 814 n.4, and I concede that anyone who presents false or fraudulent testimony does not act with "reasonable grounds." However, this does not mean

(as I think the majority implies) that false and fraudulent testimony is the only basis for proving someone has acted unreasonably. In determining whether someone has acted reasonably, it is obviously appropriate to consider the facts that they are aware of; additionally, it is proper to impute them with the knowledge that would have been discovered had a reasonable investigation been conducted. E.g., Dodson v. MFA Ins. Co., 509 S.W.2d 461, 467 (Mo. 1974). With these provisos in mind, I recount the facts that could have been found by the jury.

The Mershons' crop on the Jenkins farm was sold for $119,000; however, the Mershons owed W.K. Jenkins $125,000 for rent. W.K. Jenkins was paid before MFA because MFA had subordinated its lien to

Jenkins' landlord lien. This left no money to pay MFA. Although grain was harvested from other farms, it brought in relatively small amounts of money. The elevators issued checks for this grain, but the checks were paid solely to the Mershons. This was not unusual, as the Mershons had received checks made payable solely to them in the past, MFA knew this had happened in the past, and MFA had not given the Mershons any instructions indicating this was somehow improper. These checks were deposited in an account supervised by the Farmers and Home Administration (FHA); this was done because, in the past, MFA endorsed checks made payable to the Mershons and MFA jointly with the understanding the checks would be deposited in the supervised account. To say that the

account was "supervised" meant that FHA made sure the money was used for certain permissible uses, including living expenses. Unfortunately, none of these facts were disclosed to the prosecutor or to the judge at the preliminary hearing, even though the prosecutor conceded at this trial that some of the facts might have been important to his decision to prosecute. There also appears to have been no inquiry as to the status of the Mershons' debt to W.K. Jenkins. As stated by various MFA representatives, the criminal action was pursued simply because that they knew grain had been sold and they had not gotten any money. Finally, there is the possibility the jury believed MFA witnesses lied at the preliminary hearing as to the status of the

Mershons' harvest.

These facts, if found by the jury, would have reasonably supported its verdict that MFA did not act reasonably. By inflating the amount of crops grown by the Mershons, MFA left the implication that more money was raised; however, an investigation would have revealed that there wasn't even enough money raised to pay W.K. Jenkins' landlord lien, much less the subordinate lien possessed by MFA. As for the proceeds from crops on other farms, the Mershons simply followed a practice that they had followed in prior dealings -- which would have been vital in determining whether they intended to defraud MFA. Because these facts support the jury's verdict, I would affirm its decision.

III. CONCLUSION

Because I believe there was sufficient evidence to support the jury's verdict on these two claims, I find it difficult to conclude the district court should have directed verdicts in MFA's favor. Consequently, I would affirm on both of these counts.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX D

Order In The United States District Court for The Western District of Missouri, Western Division

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CLARK MERSHON, et. al.,

Plaintiffs,

v. 87-1011-CV-W-BB

MISSOURI FARMERS ASSOCIATION,
INC. et. al.

Defendants.

Order Filed July 30, 1992

Pending before the Court are the motion of plaintiffs Gary Mershon, Clark Mershon and Paul Mershon for a new trial and the motions of defendants Missouri Farmer's Association ("MFA"), William Beasley and Brian Griffith for judgment notwithstanding the verdict, new trial and remittitur. These motions follow a trial in which the jury returned fourteen separate verdicts, all of them

in favor of plaintiffs and against defendants, totaling $1,132,500.

On the claim of civil rights violations under 42 U.S.C. Section 1983, each of the three plaintiffs received verdicts against defendant MFA in the amount of $200,000 actual damages and $100,000 punitive damages, against defendant Beasley in the amount of $30,000 and against defendant Griffith in the amount of $10,000. Each of the three plaintiffs received verdicts against defendant MFA on the claims of malicious prosecution in the amount of $25,000, and defendant Clark Mershon received an additional award of punitive damages against MFA in the amount of $25,000 on his malicious prosecution claim. Plaintiff Clark Mershon received a verdict of $10,000 against MFA on his

claim for libel and plaintiff Gary Mershon received a verdict of $2,500 against MFA on his claim for libel.

These motions have been pending a long time and, while the Court has struggled with the resolution of these motions, ultimate responsibility for the time these motions have been pending resides with the Court. This Order will allow the parties to proceed with disposition of this case.

I.

PLAINTIFFS' MOTION FOR NEW TRIAL

Plaintiffs' motion for new trial raises four issues: First, it was error to submit the verdict director used for plaintiffs' malicious prosecution claim; second, it was error to separate the actual and punitive damage instructions on plaintiffs' claim of libel; third,

the punitive damage instruction that was given to the jury on the malicious prosecution claim was erroneous; and fourth, it was error to direct a verdict for MFA on plaintiffs' claim of false arrest.

A.

Malicious Prosecution

Each of the plaintiffs asserted a claim of malicious prosecution against MFA. The jury was instructed on this claim as follows:

> INSTRUCTION NO. 21
>
> Your verdict must be for plaintiffs Clark Mershon, Paul Mershon and Gary Mershon, or any of them, on their claim for malicious prosecution if you believe:
>
> First, Defendant MFA instigated a judicial proceeding against plaintiffs which terminated in favor of plaintiffs, and

> Second, in so doing defendant acted primarily for a purpose other than that of bringing an offender to justice and acted without reasonable grounds, and
>
> Third, the probable cause determination reached by the Court at the conclusion of the state criminal preliminary hearing was procured by false or fraudulent testimony, and
>
> Fourth, plaintiffs, or any one of them were thereby damaged.

This instruction tracts the verdict director found at Missouri Approved Instructions ("MAI") 23.07 and the recommendations in the accompanying Notes on Use and Committee Comments. The case of Sanders v. Daniel Intern. Corp., 682 S.W.2d 803 (Mo. 1984) requires that the verdict directing instruction in a malicious prosecution claim contain a finding that the defendant "acted primarily for a purpose

other than that of bringing an offender to justice and acted without reasonable cause. . . ." Id. at 814, n.4. See also Committee Comment to MAI 23.07 (1980 Revision)

The case of Kvasnicka v. Montgomery Ward & Co., 166 S.W.2d 503 (Mo. 1942) requires that if a plaintiff in a malicious prosecution action was bound over for further criminal proceedings at a preliminary hearing, as was the case here, an additional finding that the binding over was procured by false or fraudulent testimony must be made by the jury. See also Committee Comment (1980 Revision) to MAI 23.07. The instruction proffered by plaintiffs and rejected by the Court, does not adequately address these elements and goes well beyond the requirements of MAI 23.07.

Missouri law governs plaintiffs' claim of malicious prosecution and where an MAI instruction applies to a Missouri law claim, it must be given. Nickerson v. Moberly Foods, Inc., 781 S.W.2d 87, 92 (Mo. Ct. App. 1989). The court finds that the jury was properly instructed on the elements of plaintiffs' claim for malicious prosecution. Accordingly, plaintiffs' claim of error on this issue is without merit.

B.

Libel

The issues of actual damages and punitive damage under plaintiffs' claim for libel were submitted to the jury in separate instructions. The actual damage instruction tracked the language of MAI 4.16, the damage instruction for libel cases. However, the separate

punitive damage instruction departed from the punitive damage language of MAI 4.16 and, instead, followed the newly prescribed standard in Missouri for punitive damage instructions in intentional tort cases as set forth in Burnett v. Griffith, 769 S.W.2d 780 (Mo. 1989). Plaintiff takes issues with both the separation of the actual damage and punitive damage instructions and the submission of a Burnett punitive damage instruction.

In Burnett the Missouri Supreme Court changed the standard for amending punitive damages in intentional tort cases. Burnett requires that award of punitive damages in intentional tort cases must be based on proof of conduct that "is outrageous, because of the defendant's evil motive or reckless

indifference of the rights of others." Id. at 789. Because libel is an intentional tort it was necessary, in the opinion of the Court, that the punitive damage instruction given in this case reflect this standard, regardless of the fact MAI 4.16 has not yet been amended to reflect this change in Missouri law. As a result, the court finds that the jury was correctly instructed on the issue of punitive damages for plaintiffs' libel claim. The Court finds no merit in plaintiffs' claim that it was error to give separate instructions for actual and punitive damages. See e.g., Eighth Circuit Model Jury Instruction, Nos. 4.51 and 4.53.

C.

False Arrest

At the close of all the evidence

the Court directed a verdict against plaintiff Clark Mershon on his claim of false arrest. In directing this verdict the Court concluded, as a matter of law, that there was no evidence on the record from which the jury could reasonably believe that plaintiff Clark Mershon had been arrested, as that term is contemplated as an element of the tort of false arrest. Plaintiff Clark Mershon argues that his subjective belief that he could not leave the city of Tribune, Kansas or the state of Kansas was sufficient to make his claim of false arrest submissible to the jury. Plaintiff cites no legal authority for this conclusion.

There was no evidence on the record that plaintiff Clark Mershon was ever taken into custody or confined. See Day

v. Wells Fargo Guard Service, Co., 711 S.W.2d 503, 504-05 (Mo. 1986). Nor was there any evidence that defendant MFA instigated an arrest of plaintiff Clark Mershon, even if an arrest occurred. See Clark v. Skaggs Companies, Inc., 724 S.W.2d 545, 549 (Mo. Ct. App. 1986). Rather, the evidence was that Clark Mershon was asked to voluntarily come to the Tribune, Kansas Sheriff's Office. Clark Mershon was not placed under arrest or incarcerated at that time. It is important to note that an "arrest," for false arrest purposes, requires confinement or being taken into custody. Day v. Wells Fargo Guard Services, Co., 711 S.W.2d at 504-05. This analysis is different, and more strict, than that used to determine whether conduct constitutes a "seizure" for Fourth

Amendment purposes. See e.g., Tennessee v. Garner, 471 U.S. 1 (1985) (seizure under the Fourth Amendment occurs when an officer restrains the freedom of a person to walk away); Brower v. County of Inyo, 489 U.S. 593 (1989) (Fourth Amendment seizure occurs when there is governmental termination of freedom of movement through means intentionally applied). The court finds the directed verdict against plaintiff Clark Mershon on his claim for false arrest was appropriate at the close of all the evidence since the evidence showed that Clark Mershon was not confined or taken into custody.

For the above reasons, the motion of plaintiffs for a new trial will be DENIED in all respects.

II.

DEFENDANTS' POST-TRIAL MOTION

Defendants' motion seeks, in the alternative, judgment notwithstanding the verdict, new trial or remittitur on each of plaintiffs' claims where the jury returned a verdict against defendants, either collectively or individually. Defendants argue that plaintiffs' failed to make a submissible case on their 42 U.S.C. Section 1983 claims because (a) the evidence was insufficient that defendants were jointly engaged with the Bates County Prosecutor; (b) the evidence was insufficient that plaintiffs' Fourth Amendment rights were violated; (c) the evidence was insufficient that defendant Beasley had reasonable grounds to believe that a crime had been committed;

(d) defendant MFA cannot be held liable under Section 1983 on a theory of respondeat superior; and (e) there was no evidence that defendant Griffith violated any civil rights of the plaintiffs.

Defendant MFA argues that plaintiffs failed to make a submissible case on their claims of malicious prosecution because (a) the evidence was insufficient to submit to the jury the issue of whether MFA did not have reasonable grounds to believe that a crime had been committed; (b) the state prosecution did not terminate in favor of plaintiffs; and (c) there was insufficient evidence that the state court probable cause determination was procured by false or fraudulent testimony. Finally, defendant MFA

argues that plaintiffs Clark and Gary Mershon failed to make a submissible case on their claims of libel because (a) there was insufficient evidence that the statements complained of were false and (b) there was insufficient evidence that defendant Beasley knew the statements were false at the time they were made.

A.

Judgment Notwithstanding the Verdict

The standard of review for a motion for judgment notwithstanding the verdict is that "[t]he granting of a motion for judgment notwithstanding the verdict is appropriate 'only if the evidence points all one way and is susceptible of no reasonable inferences sustaining the position of the non-moving party.'" Glass Design Imports, Inc. v. Imports

Specialties, 867 F.2d 1139, 1142 (8th Cir. 1989) (citation omitted); See Dace v. ACF Industries, Inc., 722 F.2d 374, 375-76 (8th Cir. 1983); Hauser v. Kubalak, 929 F.2d 1305 (8th Cir. 1991).

Section 1983

MFA

Defendant MFA argues that, under the holding of Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978), it cannot be responsible under Section 1983 for the acts of its employees on a theory of respondeat superior. In Monell the Supreme Court held that municipal corporations could not be held liable under Section 1983 on a theory of respondeat superior and that Section 1983 cannot be used "to impose liability vicariously on governing bodies solely

on the existence of an employer-employee relationship with a tortfeasor." Id. at 692. The holding of Monell, which expressly address municipal corporations, has been extended by most of the circuits to private corporations. Harvey v. Harvey, 949 F.2d 1127, 1129 (11th Cir. 1992); Iskander v. Village of Forest Park, 690 F.2d 126, 128 (7th Cir. 1982); Powell v. Shopco Laurel Co., 678 F.2d 504, 506 (4th Cir. 1982). In the case of Lux by Lux v. Hansen, 886 F.2d 1064, 1067 (8th Cir. 1989) the Eighth Circuit Court of Appeals refused to hold a private mental health center liable under 42 U.S.C. Section 1983 on the theory of respondeat superior. The court finds that the Lux case is applicable to the case at bar and thus the case of Monell is applicable to MFA

as a private corporation. Therefore, MFA cannot be held liable under Section 1983 solely on the basis of respondeat superior.

There are, however, two ways that a private corporation may be held responsible under Section 1983 for the acts of its employees. The first is if the employees acted pursuant to an impermissible or unconstitutional official policy of the company or private corporation. See Polk County v. Dodson, 454 U.S. 312 (1981); Iskander v. Village of Forest Park, 690 F.2d 126 (7th Cir. 1982). The second way to hold a private corporation liable under Section 1983 is to show that its employees acted pursuant to a persistent and widespread custom or practice. See Bennett v. City of Slidell, 735 F.2d

861, 862 (5th Cir. 1984). cert. denied., 472 U.S. 1016 (1985).

Considering first whether MFA had an impermissible or unconstitutional official policy, plaintiffs state that:

> [P]laintiffs admit there is no evidence that a person with final policy making authority made the decision to sign the criminal complaints against the Mershons and or that such a persons, or his designee, signed the criminal complaints pursuant to a "constitutionally forbidden" official policy.

Plaintiffs' Suggestions in Opposition to Defendants' Motion for Judgment Notwithstanding the Verdicts, New Trial or Remittitur at 17. Although plaintiffs make this statement in the context of their argument that Monell does not apply to this case, the Court agrees with plaintiffs assessment that there was no evidence at trial that the

individual defendants, or others, were persons with final policy making authority at MFA or that they acted pursuant to a constitutionally forbidden policy of MFA. As a result, MFA cannot be held liable in this case under Section 1983 on the theory that its employees acted pursuant to an impermissible or unconstitutional policy.

Likewise, the evidence at trial was insufficient to allow a reasonable person to conclude that defendants Beasley, Griffith or any other MFA employees acted pursuant to a persistent custom or widespread practice at MFA of utilizing the criminal justice system for purposes of collecting a civil debt. While it was appropriate, as the court later concludes, to submit to the jury

the issue of whether defendant Beasley violated plaintiffs' civil rights by resorting to the criminal justice system, in conjunction with the state prosecutor, to collect a civil debt from plaintiffs, there was no evidence that Beasley acted in accordance with a widespread custom or practice of such conduct at MFA. For the above-noted reasons, the court finds that judgment notwithstanding the verdict is appropriate for defendant MFA on plaintiffs' Section 1983 claims.

Griffith

Defendant Griffith argues that there was no evidence on the record from which a reasonable person could infer that he was jointly engaged with the state prosecutor, or otherwise acted, to deprive plaintiffs of their

constitutional rights. The Court agrees. There is little, if any, evidence of the involvement of Griffith in conduct which forms the basis of plaintiffs' claims. The evidence shows that Griffith's role was limited to his functioning as in-house counsel for MFA and to reviewing the criminal complaint which MFA filed against plaintiffs. There was no evidence that Griffith acted improperly in reviewing the complaint or in rendering service as in-house counsel. He was asked by MFA to review the complaint and offer his opinion of whether the complaint was properly drafted and legally sufficient. His rendering of this advice, regardless of whether it was right or wrong, was not improper. Plaintiffs' argument that his alleged failure to investigate the

complaint is sufficient to subject Griffith, individually, to Section 1983 liability under the facts of this case is without merit.

The only additional evidence pertaining to Griffith related to four telephone messages from the state prosecutor. These messages were limited to the fact that Griffith had been called by the state prosecutor when Griffith was unavailable. There was no evidence about what information these messages were intended to convey. There is insufficient evidence on the record in this case to justify the submission to the jury of any claims of Section 1983 liability against defendant Griffith. Judgment notwithstanding the verdict will be entered with respect to defendant Griffith.

Beasley

Defendant Beasley first argues that plaintiffs failed to make a submissible case that he was jointly engaged with the state prosecutor Hugh Jenkins, and therefore, there was no state action to hold Beasley liable under Section 1983 purposes. Beasley claims that there was no evidence that he, as a private party, was engaged in a "conspiracy" with the state prosecutor.

There is no doubt that Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) controls this case and requires that Beasley, as a private party, must have been jointly engaged with the state prosecutor, as a public official, in order to subject him to Section 1983 liability. See also Dennis v. Sparks, 449 U.S. 24 (1980). Both the cases of

Adickes and Sparks contain language which indicates that a conspiracy between private and state actors is enough to bring the private actors under the umbrella of Section 1983. Adickes, 398 U.S. at 152; Sparks, 449 U.S. at 28-29. However, in discussing what constitutes being jointly engaged, Adickes and Sparks also speak in terms of "willful participation" "reach[ing] an understanding" and "meeting of the minds." Adickes, 398 U.S. at 152, 158; Sparks, 449 U.S. at 128. It may be that the difference between conspiracy and these terms is a difference without distinction. However, for purposes of this case, it is not necessary to conduct an exhaustive examination of the differing nuances and subtleties between conspiracy and any of the other phrases

referred to in Adickes and Sparks. Based on the evidence submitted at the trial of this case, the undersigned concludes that there was evidence sufficient to submit to the jury the issue of whether Beasley was jointly engaged with the state prosecutor.

It is important to remember that in considering defendants' motion for judgment notwithstanding the verdict, the only issue is whether plaintiffs made a submissible case that Beasley was jointly engaged with the state prosecutor. Whether the undersigned would have ultimately found that plaintiffs failed in their burden of proof, had the court been the fact finder, is not the issue.

The fact that much, if not all, of the evidence plaintiffs relied on is

circumstantial does not defeat submissiblity of their Section 1983 claims. In Adickes the Supreme Court relied heavily on the circumstantial nature of the evidence, in particular the fact that the private party and the state actor were together for a short time in a restaurant, to allow the case to go forward for determination of whether there was joint activity. Specifically, the Court stated "[i]f a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." Adickes, 398 U.S. at 158.

In the present case the evidence

and circumstances were sufficient to allow the jury to draw the inference that Beasley and the state prosecutor were jointly engaged in conduct that denied plaintiffs' civil rights which were protected by Section 1983. There was evidence that the state prosecutor was the son of a substantial client of MFA and that the state prosecutor himself held an interest and position of control with an entity, Green Acres Farm, that did considerable business with MFA. There was evidence of communication between Beasley and the prosecutor, and evidence of communications between plaintiffs, Beasley and the prosecutor from which a jury could infer joint activity. There was also evidence of conduct by defendant MFA, namely, the possible

alteration of signatures on a check endorsement, which the jury could infer was corroborative of joint activity with the state prosecutor. This court concludes that the totality of the evidence made the issue of whether Beasley was jointly engaged with the state prosecutor submissible to the jury.

Beasley next argues that without an actual custodial arrest of plaintiffs which this court has held did not occur for purposes of a false arrest claim, there can be no Fourth Amendment violation sufficient to support a Section 1983 claim. Beasley's argument is without merit. In this case, the claimed constitutional deprivation is Beasley's resort, in conjunction with the state prosecutor, to the criminal

justice system for the purpose of collecting a civil debt. It is the instigation of the criminal process and the issuance of a warrant, not an actual arrest, of which plaintiffs complain. It is simply a matter of happenstance, i.e., plaintiffs' voluntary surrender and submission to the criminal process, that made any actual arrest unnecessary. This circumstance should not, and does not, thwart plaintiffs' claim.

The Fourth Amendment addresses misuse of power, not the accidental consequences of otherwise lawful conduct. Brower v. County of Inyo, 489 U.S. 593 (1989); Byars v. United States, 273 U,S. 28 (1927). Under the circumstances of this case, the instigation of criminal process and the issuance of arrest warrants constituted

a "seizure" sufficient to state a claim of constitutional deprivation under the Fourth Amendment. A seizure occurs for purposes of Fourth Amendment analysis where there has been a restraint of freedom. Tennessee v. Garner, 471 U.S. 1 (1985); Brower v. County of Inyo, 489 U.S. 593 (1989). Voluntary surrender on a warrant and submission to the criminal process restricts the movement of an individual. That person is not free to flee the prosecution to which he has submitted or fail to appear for future proceedings in the criminal process. Thus, in this case a seizure occurred, even though there was no formal arrest.

Beasley's final argument that he had reasonable grounds to believe that a crime had been committed, meaning that submission of Section 1983 liability

against him is inappropriate, is without merit. While the undersigned might not have reached the same conclusion as the jury, whether Beasley had reasonable grounds to believe that a crime had been committed was a question for the jury and the court concludes there was sufficient evidence on the record to submit this issue to the jury for resolution.

MALICIOUS PROSECUTION

MFA argues that judgment notwithstanding the verdict on plaintiffs' claims of malicious prosecution is appropriate because first, plaintiffs failed to make a submissible case that MFA did not have reasonable grounds to believe that a crime had been committed, second, the criminal prosecution did not terminate

in favor of plaintiffs, and third, plaintiffs failed to make a submissible case that the probable cause determination was procured by false or fraudulent testimony.

The court has already concluded that the issue of whether Beasley and MFA had reasonable grounds to believe that a crime was committed was a question for the jury and that plaintiffs made a submissible case on this issue sufficient to present it to the jury. Likewise, the court concludes that plaintiffs made a submissible case that the probable cause determination was procured by false or fraudulent testimony and this issue was one properly resolved by the jury.

Deserving of more attention is MFA's argument that the underlying

criminal prosecution did not terminate in favor of plaintiffs, thereby barring their claim of malicious prosecution. Under Missouri law, an element of a claim of malicious prosecution is that the underlying criminal prosecution terminated in favor of the plaintiff in the malicious prosecution action. Haswell v. Liberty Mut. Ins. Co., 557 S.W.2d 628 (Mo. 1977).

MFA argues that the criminal prosecution of plaintiffs did not terminate in their favor because the charges were nolle prosequi. MFA argues that a nolle prosequi is dismissed without prejudice and thus, does not constitute termination of the criminal proceedings in favor of plaintiffs.

MFA cites no authority, and the Court has found none, that a nolle

prosequi of a criminal is not a termination in favor of a malicious prosecution plaintiff. The authority to the contrary relied on by plaintiffs is somewhat dated. See Kennedy v. Holladay, 25 Mo. App. 503 (1887); Lehmer v. Smith, 284 S.W. 167 (Mo. Ct. App. 1926). MFA relies on cases which hold, in a civil context, that a dismissal without prejudices is not a termination in favor of a malicious prosecution plaintiff. However, even these cases recognize that a dismissal without prejudice may constitute a termination in favor of a malicious prosecution plaintiff if there is an intent to abandon the claim. Zahorsky v. Barr, Glynn and Morris, P.C., 693 S.W.2d 839, 842 (Mo. Ct. App. 1985). This court is not prepared to hold that, under the

circumstances of this case, the decision to nolle prosequi the criminal charges against defendants did not, in and of itself, constitute a termination of the criminal proceedings in favor of plaintiffs. Further, the jury could infer from the evidence that neither MFA nor the state prosecutor, who testified at trial, intended to pursue any further criminal charges against plaintiffs. This inference was reasonable in light of evidence of plaintiffs' and MFA's conduct, the circumstances surrounding the original criminal charges, including the decision to nolle prosequi the charges, and the passage of time. The Court finds that the nolle prosequi dismissal of the criminal charges against plaintiffs was a termination of the proceedings in plaintiffs' favor.

Therefore, MFA is not entitled to judgment notwithstanding the verdict on this issue.

LIBEL

MFA argues that judgment notwithstanding the verdict should be granted in its favor on plaintiffs' claims of libel because plaintiffs failed to prove that the statement complained of, namely those contained in the criminal complaint, were false. MFA rests its argument on the weight and credibility of the evidence produced at trial. Specifically, MFA submits that plaintiffs' claims that they were innocent of wrong doing were not credible and were based on fabricated evidence. While this court, if it were the fact-finder, may have agreed with MFA's assessment of the evidence, the

arguments raised by MFA go to issues that are more properly left to the jury. There was sufficient evidence, in the opinion of this court, to submit plaintiffs' claims of libel to the jury. Given this conclusion, the court is reluctant to tamper with the jury's findings. The court also rejects MFA's argument that it is entitled to judgment notwithstanding the verdict on the grounds that defendant Beasley believed the statements complained of were true.

NEW TRIAL AND REMITTITUR

A motion for new trial may be ordered only when the court is convinced that the verdict goes against the weight of the evidence or where a miscarriage of justice will result. Hauser v. Kubalak, 929 F.2d 1305 (8th Cir. 1991); Benjamin v. Aluminum Co. of America, 921

F.2d 170, 173 (8th Cir. 1990). This Court must set aside the verdicts of the jury if the verdicts are against the clear weight of the evidence. Ouachita Nat. Bank v. Tosco Corp., 686 F.2d 1291, 1294 (8th Cir. 1982). In the alternative to the court's conclusions on defendant Griffith's and MFA's motion for judgment notwithstanding the verdict, the court concludes that the judgment notwithstanding the verdict, the court concludes that the jury's verdicts against defendants MFA and Griffith on plaintiffs' 42 U.S.C. Section 1983 are against the clear weight of the evidence. As a result, the motion of defendants MFA and Griffith on plaintiffs' claims of a violation of 42 U.S.C. Section 1983 is granted. Defendants motion for new

trial is denied in all other respects.

The issue of remittitur is one solidly within the discretion of the court and remittitur is only appropriate when the damages are "so grossly excessive" that they "shock the conscience of [the] Court." Ouachita National Bank v. Tosco Corp., 686 F.2d 1291, 1295 (8th Cir. 1982). Given the findings of the jury on plaintiffs' Section 1983 claims against defendant Beasley and their libel and malicious prosecution claims against MFA, the damages awarded by the jury do not shock the conscience of this court and the damages were not grossly excessive.

The only remaining punitive damages are those awarded in favor of plaintiff Clark Mershon and against MFA in the amount of $25,000 on Clark Mershon's

claim of malicious prosecution. The Court has considered this award in light of the evidence and the holding of Pacific Mutual Life Insurance Co. v. Haslip, _____ U.S. _____ 111 S.Ct. 1032 (1991) and does not find the punitive damages to be excessive or otherwise inappropriate.

CONCLUSION

The Court has considered plaintiffs' arguments that defendants did not adequately preserve their grounds for post-judgment relief and that defendants' post-judgment motion was untimely filed. These arguments are without merit. For the reasons stated above, it is

ORDERED that the motion of plaintiffs Gary Mershon, Clark Mershon and Paul Mershon is DENIED in all

respects. It is further

ORDERED that the motion of defendants MFA and Brian Griffith for judgment notwithstanding the verdict on plaintiffs' claim of a violation of 42 U.S.C. Section 1983 is GRANTED. It is further

ORDERED that the motion of defendant William Beasley for judgment notwithstanding the verdict on plaintiffs' claim of violation of 42 U.S.C. Section 1983 is DENIED. It is further

ORDERED that motions of defendants MFA and Brian Griffith for a new trial on plaintiffs claims of a violation of 42 U.S.C. Section 1983 are GRANTED. It is further

ORDERED that the motions of defendants MFA for judgment

notwithstanding the verdict and for new trial on plaintiffs' claims of malicious prosecution and libel are DENIED. It is further

ORDERED that the motions of defendants MFA, Beasley and Griffith are for remittitur are DENIED.

/s/ John T.Maughmer
Chief United States Magistrate Judge
Kansas City, Missouri

FILED
JAN 17 1994
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No. 93-852

In The

Supreme Court of the United States

October Term, 1993

CLARK MERSHON, PAUL MERSHON AND GARY MERSHON,

Petitioners,

vs.

MISSOURI FARMERS ASSOCIATION, WILLIAM BEASLEY AND BRIAN GRIFFITH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION

COUNTER STATEMENT OF THE CASE

Summary of Facts

Petitioners' 38-page Statement of Facts is chock full of inaccuracies, misleading conclusions, "facts" not found in the record, irrelevant material and improper opinions. *See* pp. 3-6, *infra*. For their Counter Statement of Facts, Respondents direct this Court to The Eighth Circuit Court of Appeals' opinion in which the court set out the

following brief, yet complete, description of the relevant facts.

> Between 1983 and 1987, brothers Clark, Paul, and Gary Mershon farmed as a partnership in Bates County, Missouri. During that time, they borrowed money through a line of credit with the Missouri Farmers Association (MFA). The loan was secured by a lien on the crops to be harvested by the Mershons. In mid-1987, *after learning the Mershons had deposited directly into their personal bank account a check from a buyer of some of their crops*, the MFA filed a civil suit against the Mershons in state court to collect on the outstanding loan (the MFA won this suit in May, 1990).
>
> At the same time that the state court civil suit was filed, the MFA made a criminal complaint against the Mershons, alleging that they had defrauded a secured creditor, namely the MFA. The county prosecutor subsequently initiated criminal proceedings against the Mershons. . . . In early 1988, the Mershons appeared for a preliminary hearing on the state criminal charges. The state court found probable cause for prosecution. In late 1989, the county prosecutor withdrew from the criminal action, but the case was pursued by the state attorney general's office. In mid-1990, the state attorney general's office dropped the criminal charges against the Mershons.

Mershon v. Beasley, 994 F.2d 449, 450 (8th Cir. 1993), Appendix to Petition, C-2 through C-4 (emphasis added).

Respondents submit that this description of the facts is sufficient for purposes of the Petition. However, in

light of the admonition contained in Rule 15.1, Respondents make the following corrections to the Petitioners' Statement of Facts.[1]

Corrections to Petitioners' Statement of Facts

A. The Petitioners' statement that "in 1985 MFA knew [the Mershons] were selling grain but no one from MFA ever called them and complained about MFA not getting money or their name being on the checks," (Petition p. 10), is both false and misleading.

First, the Mershons themselves testified that they had no reason to believe that MFA knew they were selling grain in 1985 without getting MFA's name on the checks. (I Tr. 67).[2] Second, MFA's representatives testified that all of the grain checks which MFA knew of in 1985 were in fact made payable jointly to the Mershons and MFA. VI Tr. 261, Def. Ex. DDD-1 to DDD-9. Accordingly, there would be no reason for MFA to object to a practice it did not know was occurring.

B. The Petitioners' description of their lease with W.K. Jenkins – and in particular their statement that the lease "provided all checks were to be made out to W.K.

---

[1] Respondents have chosen to ignore many of the factual misstatements contained in Petitioners' Statement of Facts for the reason that they are wholly irrelevant. Thus, for example, Respondents have ignored Petitioners' statement that they were once "farm family of the year," (Petition p. 8), even though that "fact" is nowhere in the record.

[2] References in the form "___ Tr. ___" are to the separately-paginated volumes of the trial transcript. References in the form "Def. Ex. ___" or "Pl. Ex. ___" are to the original trial exhibits.

Jenkins/Green Acres Farm until the lease was paid in full" – (Petition p. 11) is without any basis in the record. The lease was never marked as an exhibit, never mentioned at trial and there was no testimony about the terms of the lease by any witness.

C. Similarly, Petitioners' statement that they "immediately informed the first secured creditor, W.K. Jenkins, the check had been deposited," (Petition pp. 15-16), is again without any basis in the record. W.K. Jenkins was not a witness at trial and the Mershons never testified as to this "fact".

D. The Petitioners' description of "the Mershons' past practice with MFA," (Petition pp. 16-17), is both inaccurate and incomplete. The only checks which the Mershons "deposit[ed] into the bank" were checks which were jointly payable to the Mershons, MFA and the Farmers Home Administration ("FmHA"). VI Tr. 26. MFA endorsed those checks for deposit into an FmHA supervised account for subsequent payment to MFA.[3] Because the FmHA's security interest in those crop proceeds was junior to MFA's lien, this practice did not jeopardize the proceeds. VI Tr. 25-28.

E. When Petitioners' state that "MFA would sign off on" checks (Petition p. 17), they fail to mention that when MFA did endorse checks over to the Mershons they required the Mershons to sign a "Partial Release of Collateral Agreement." Def. Ex. V. That agreement expressly required the Mershons to acknowledge the fact that MFA

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[3] Checks written on that account had to be countersigned by the local FmHA representative. VI Tr. 25.

continued to possess a security interest in the remaining crops. Def. Ex. V.

F. The Petitioners' recitation of events surrounding a photocopy of a photocopy of a $1,919.98 check (Petition pp. 19-21) fails to mention the fact that the original document was "lost" by Petitioners' counsel, V Tr. 63, 68-69, and was thus not available to disprove the Petitioners' fanciful argument.

G. The Petitioners' statement that the Bates County prosecutor sent "blank criminal complaints" to MFA (Petition p. 24) is false. Rather, the trial testimony established that the complaints were complete except for the date and the formal name of the complainant. III Tr. 177, 192.

H. The Petitioners' description of the events leading up to the signing of the criminal complaints (Petition pp. 24-26) and their recitation of "[t]he only facts" that MFA had at the time it signed the criminal complaints (Petition pp. 28-29) is grossly incorrect.

The undisputed evidence established that *prior* to signing the criminal complaints MFA obtained a copy of a cancelled check from Highley Feed & Supply, Inc. for $1,424.91 which was made payable solely to the Mershons. That check – which was for the sale of grain which MFA had a security interest in – had been endorsed by the Mershons and deposited into their personal bank account. V Tr. 175-77.

I. The Petitioners' description of the state court preliminary hearing (Petition pp. 38-45) is false and misleading. As just one example, Respondents point to the

Petitioners' contention that an MFA witness falsely testified at the preliminary hearing that he saw one of the Mershons harvesting their crop. (Petition p. 44). As the court of appeals correctly noted, however, "the transcript of the preliminary hearing actually reflects that the testimony was that Paul Mershon was observed *planting* crops, not *harvesting* them." *Mershon v. Beasley*, 994 F.2d 449, 454 (8th Cir. 1993), Appendix to Petition, C-23 (emphasis added).

J. Contrary to the Petitioners' statement (Petition p. 45), the criminal charges against them were not dismissed *with* prejudice. The state attorney general filed a *nolle prosequi*, which is a dismissal *without* prejudice under Missouri law. *See Jones v. State*, 771 S.W.2d 349, 351 (Mo. App. 1989).

K. Finally, the Petitioners' statement that they attempted to introduce evidence of a "pattern and practice of seeking criminal prosecution against other defaulting debtors," (Petition p. 45), is false and misleading.

First, the Petitioners' evidence of a "pattern and practice" consisted of two instances when MFA contacted law enforcement officials concerning suspected criminal activity. V Tr. 82. Respondents submit this evidence hardly constitutes a "pattern and practice."

Second, the Mershons fail to disclose to this Court the fact that they did not even challenge the trial court's ruling excluding this evidence in their appeal to the Eighth Circuit.

REASONS FOR NOT GRANTING THE WRIT

Respondents submit that, stripped of all its rhetoric, the Petition in this case seeks to have this Court review this case for the purpose of rewriting Rule 50(a) of the Federal Rule of Civil Procedure so that instead of reading:

> "no legally sufficient evidentiary basis for a reasonable jury"

it would read:

> "no possible basis for any jury – even an unreasonable jury."

(Petition pp. 51-52). Respondents submit that such a suggestion is – on its face – without any merit whatsoever.

Rather, Respondents believe that the language contained in the present Rule 50 serves the salutatory purpose of preventing runaway juries from ignoring the law. As explained by Professor Cooper, "[t]he vital justification for the institution of directed verdicts is found in the need to provide at least some minimal device for preserving the integrity of the legal rules given by judges." Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 907 (1971). Without this control, juries could simply decide cases based on which of the parties was most attractive or some other extra-legal consideration.[4]

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[4] In fact, the Respondents in this case – a large corporation, an attorney and a bill collector – were hardly an "attractive" group. Further, Petitioners' counsel made much of this fact during her closing argument. VIII Tr. 78, 86, 122, 125.

Furthermore, certiorari is an inappropriate vehicle for amending Rule 50. Rather, if this Court sees a need to amend the rule it should do so in the fashion prescribed by Congress for amending the Federal Rules of Civil Procedure.[5] *See* 28 U.S.C. § 2072 (1990). This Court should not bypass these procedures and amend Rule 50 simply by granting certiorari in this one case.

Moreover, Respondents submit that because the rule is not broken it does not need to be fixed. Rather, Respondents submit that both the lower courts and this Court have consistently applied the standard set forth in Rule 50 and have repeatedly affirmed judgments entered as a matter of law when there has been "no legally sufficient evidentiary basis for a reasonable jury to have found for the [prevailing] party."[6] *See, e.g., Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993) (Court affirmed the district court's finding of judgment as a

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[5] In fact, this Court had ample opportunity to change the Judgment as a Matter of Law standard in Rule 50 when that rule was amended in 1991 and again when this Court presented a host of revisions to the Rules of Civil Procedure this past year. This Court's failure to make such a change is persuasive evidence of a lack of desire on this Court's part to adopt Petitioners' view.

[6] Contrary to Petitioners' suggestion (Petition p. 50), Justice Scalia did not "lament[] the vagueness of the 'reasonable person' standard" in *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993). Rather, Justice Scalia commented that the terms "objectively abusive" or "objectively hostile" do not provide a "very clear standard" to judge harassment claims under Title VII of the Civil Rights Act of 1964. *Id.* at 372. Respondents submit that this mischaracterization of Justice Scalia's statement is telling evidence of the Petitioners' 'lamentable' inability to accurately present the facts and issues in this case.

matter of law contrary to the jury's verdict after a 115-day trial involving almost 3,000 exhibits and over 20 witnesses).

CONCLUSION

Because the Petition fails to raise an important question of federal law which has not been, but should be, settled by this Court, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 93-852

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Respondents.

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For the Eighth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

I. Petitioners' Response to Respondent's Summary of Facts.

The majority of Respondents' opposition is simply a weak attempt to disparage without any legitimate basis Petitioners' Statement of Facts which is completely accurate and supported by the

record in this case as indicated herein. For their response to Respondents' Counter Statement of Facts, Petitioners state the following:

Respondents claim[1] the Eighth Circuit stated in two brief paragraphs all relevant facts in this case. Petitioners disagree. The opinion not only fails to set forth all the relevant facts, but those facts set forth are not supported by the record. The critical relevant facts omitted by the Eighth Circuit include:

1. Jenkins'--the prosecutor--refusal to withdraw despite his clear conflict of interest because the proceeds MFA claimed were from his father's, W.K. Jenkins', farm. (Vol.IV, p.38 and 137).[2]

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[1] Respondents' Br. at p. 1-2.

[2] All references to "Vol." reference the trial transcript.

2. MFA's in-house attorney, Griffith, stated to Mershons' attorney, Howard, MFA filed the criminal charges to preserve an exception to discharge should the Mershons seek protection of the bankruptcy court and that "restitution would appease the prosecutor." (Vol. IV, p. 33).

3. Howard testified Cullen Cline, another MFA attorney told her MFA could make the criminal charges go away if debt in the MFA civil suit was paid. Cline drafted a letter to Howard (not sent) but admitted in evidence in which he represented MFA would be in a position to make efforts to have the criminal charges against the Mershons dismissed.[3]

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[3] The trial court refused this evidence despite the fact it showed the "essence of the common plan". (Vol. IV, p.7-11; Ex.176 & 176A).

4. On June 15, 1987 there was a telephone conversation between Beasley and Jenkins memorialized in a memo by Beasley stating: "6-15-87. Called Hugh Jenkins - he advised Mershons will be arraigned either next week or following week & will advise of progress. They to try to make Mershons make restitution" (Ex.42). On July 16, 1987 there was a second telephone conference between Jenkins and Beasley in which Jenkins tells Beasley warrants are to be issued for the Mershons' arrest the next day; Beasley's memo of this conversation states: "7-16-87. per Hugh Jenkins - they to issue warrants for arrest tomorrow. Requesting $10,000.00 bond. Will advise of preliminary hearing." (Ex.43). Jenkins testified there were no warrants at this time.

5. In a November, 1987 conversation between P. Mershon and Bennett (Beasley's supervisor) Bennett told P. Mershon "if it [the money] was paid, we would have no interest in that action down there" (Vol.III, p. 196) and would help in getting the criminal charges dropped.

6. After the preliminary hearing, Carolyn Mershon (Petitioners' mother) had a conversation with Bennett, Beasley, and Griffith in which she was told "if the boys would make restitution, they would drop the criminal charges - - or drop the charges for their arrest." (Vol. V, p.44). A few days later, Carolyn Mershon spoke with Jenkins and was told by him he could not drop the charges unless MFA agreed to drop them. (Vol. V, p. 49).

7. Even though MFA had no specific facts

Mershons had defrauded MFA, Bennett testified MFA contacted the prosecuting attorney's office about bringing the criminal charges because "we felt we were getting shafted in that we were not going to get paid." (Vol.III, p.195).

8. Griffith had familiarity with bankruptcy laws and knowledge of exceptions to bankruptcy for defrauding a secured creditor. Jenkins testified in 1986-1987 he was aware if the alleged crime of defrauding a secured creditor is proven, the individual cannot discharge that particular debt in bankruptcy. (Vol. IV, p.148).

9. Griffith joined Jenkins at counsel table during the preliminary hearing, even though by his own admission he had no purpose for being there. (Vol.

IV, p. 196).

10. At the preliminary hearing evidence was presented by Jenkins of a check, made payable to the Mershons, MFA and others with whited out signatures.[4]

The panel's majority opinion sets out "facts" not supported by the record: (1) the panel states after Jenkins removed himself from the case, the State attorney general's office pursued the matter; BUT, Jenkins testified the case was not pursued by the State. (Vol.IV, p.206-208). The reason it was not pursued was because he and his father had the first lien.[5] (Vol.IV, p.207-208). (2) the panel

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[4] The trial court stated the whited-out check could be considered as evidence of a scheme or agreement of wrongful acts on the part of MFA against Petitioners. (Vol. III, p. 111, 114).

[5] This last evidence was excluded by the trial court.

inaccurately states the Mershons deposited a check directly into their account. G. Mershon deposited one check.[6] (3) the panel inaccurately states a civil suit was filed after the Mershons had deposited money directly into their account. The civil suit was filed months later, on nonpayment of a promissory note, not on conversion.

II. PETITIONERS' RESPONSE TO RESPONDENT'S "CORRECTIONS"

As to Respondents' alleged "corrections", subparts A-K, Petitioners stand by the facts set forth in their Statement of Facts and provide the following citations to the record for these statements:

---

[6] This is particularly relevant in that criminal proceedings were brought against C. Mershon and P. Mershon, even though the acts of one partner do not make the other partners criminally liable.

A. Petitioners' statement that "in 1985 MFA knew [the Mershons] were selling grain but no one from MFA ever called them and complained about MFA not getting money or their name being on the checks."

G. Mershon testified he and his brothers were always in communication with MFA employees Hicks and Beasley as to the status of the crop and how the operation was going. (Vol.I, p.67). Neither Hicks nor Beasley told G. Mershon to put MFA's name on the check. Mershons also sold grain at MFA's local elevators; the checks were issued while the grain was being brought to the elevators. (Vol. I, p. 66).

B. Petitioners' statement that W.K. Jenkins' lease "Provided all checks were to be made out to W.K. Jenkins/Green Acres Farm until the lease was paid in full".

Jenkins, Prosecutor as well as President of Green Acres Farms which was being farmed by the Mershons, testified the Mershons were in his and his father's home

in 1985 and 1986 to arrange for the lease. (Vol.IV, p.121). Beasley testified that prior to signing the criminal complaints he knew W. K. Jenkins had a first lien on the crops, that MFA recognized the first lien, and knew W. K. Jenkins had not yet been paid in full. ((Vol. V, p. 146).

C. Petitioners' Statement that Mershons "immediately informed the first secured creditor W.K. Jenkins, the check had been deposited" is in the record.

G. Mershon testified this check was cashed but that he took the check to W.K. Jenkins first and told him he needed to use the money for fuel. (Vol. I, p. 98-99).

D. Petitioners' description of Mershons' past practice with MFA is accurate and complete.

Petitioners' statement as to their past practice with MFA is supported by the record.[7] Respondents make a generalized

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[7] Petitioners' Br. at p. 16-17.

disclaimer while mentioning only one alleged "inaccuracy" -- that the only checks Mershons deposited into the bank were checks which were jointly payable to Mershons, MFA and the Farmers Home Administration ("FmHA").[8] Respondents' statement is incorrect because they refer to a few checks MFA put into evidence[9] which were made out jointly. (Vol.VI, p.26). The record shows other checks were made payable to the Mershons in their sole names and deposited in the Mershon Brothers Farms Account.[10] G. Mershon testified there had been checks with just the Mershon Brothers' names on them, which were cashed. (Vol.I, p.106)

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[8] Respondents' Br. at p. 4.

[9] Def. Exhibits DDD-10 through DDD-16.

[10] Def. Ex. D and E.

E. MFA states when they did endorse checks Mershons had to sign a partial release of collateral agreement.

On one occasion the Mershons signed a partial release of collateral agreement. This was the $1,919.98 check on which the Mershons names' were whited out and which MFA provided to Jenkins to be used at the preliminary hearing as alleged "evidence" of fraud. The record shows MFA signed off on other checks[11] but there were no other partial releases of collateral signed.

F. Respondents' claim that a photocopy of a $1,919.98 check was lost by Petitioners' counsel is not supported by the record.

Respondents' record reference does not support a check was "lost" by Petitioners' counsel Howard. The photocopy of the $1,919.98 check with the four endorsements[12] was made an exhibit at the

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11 Def. Ex. DDD-10-DDD-16

12 Plaintiffs' Ex. 21(c) and (d).

state preliminary hearing after Jenkins put into evidence the same check with two of the names "whited out." (Vol. V, p. 64). The exhibits from the state preliminary hearing were last seen in the state court's file, but were missing at the time of the District Court trial. (Vol.V, p.66). Carolyn Mershon, C. Mershon, and Howard, at trial described the original check and identified the photocopy as identical to the original and having the four endorsements on the check. (Vol. V, p. 27, 60, 62).

G. Petitioners' statement that the Bates County prosecutor sent "blank criminal complaints."

The criminal complaints when sent to MFA were blank as to date of complaint, date of alleged incident, and name of complainant. The fact these complaints were "blank" as to such crucial information, coupled with the fact that

Jenkins wrote Beasley a letter (Ex. 29, Vol.III, p.230) asking for the type and amount of grain sold, dates the grain was sold, and a description of the property where the grain was farmed shows the prosecutor had done no investigation. Beasley wrote back to Jenkins stating he did not know the information Jenkins was requesting (Ex. 52), yet Beasley still signed the "blank" complaint rather than waiting until the complaint was fully completed.

H. Petitioners' description of the events leading up to the signing of the criminal complaints is accurate and supported by the record.

The record supports Petitioners' description of the facts leading up to the signing of the criminal complaints. (Vol.III, p. 177-181, 188-196; Vol.VI, p. 107-112, 114-118).

I. Petitioners' description of the state court preliminary hearing[13] is accurate and supported by the record.

The record supports Petitioners' description of the state court preliminary hearing.(Vol. II, p. 93, 95; Vol.III, p. 183, 224-225; Vol.IV, p.138, 154-155, 164, 196; Vol. V, p. 139-141, 159, 163-164, 167-168, 172; Pre. Hrg. Tr. at 23-24, 108, 111-112, 133; (Ex. 21C [the whited out check]; Ex. 101).

J. Petitioners' statement that the criminal charges against them were dismissed with prejudice.

In 1990 the State prosecutor filed a nolle prosequi on all of the charges at the State's costs. (Pl. Ex. 61, 61(a), 61(b)). The charges were never refiled. The lack of refiling the case is evidence the case was abandoned.

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13 Petitioners Br. at pp. 38-45.

K. Petitioners' statement that they attempted to introduce evidence of a "pattern and practice" of seeking criminal prosecution against other defaulters.

Contrary to MFA's assertion, the statement is not false and misleading. Mershons attempted to present such evidence but it was excluded by the trial court. (offer of proof at Tr. Vol. V, p. 77-82; Ex.164 & 165).[14] In these excluded defaulting debtors' files were letters showing the debtors' intent to discharge in bankruptcy and MFA's attempt to coerce payment under threat of criminal

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[14] The panel incorrectly states (App. C-12) petitioners offered no evidence that MFA had sought criminal prosecution of other defrauding debtors in the past or that the prosecutor had filed criminal charges in the past against other debtors who had defaulted on MFA loans. To rely upon evidence excluded by the trial court certainly is a miscarriage of justice.

prosecution. (Vol. V, p. 77-82). The files also showed MFA through Beasley and Griffith were pursuing civil collection while simultaneously pursuing criminal charges for defrauding a secured creditor--the same pattern as in the Mershon case.

ARGUMENT

The panel's opinion is contrary to the Eighth Circuit's standard of review set out in Gilkerson v. Toastmaster, Inc., 770 F.2d 133 (8th Cir. 1985) and Dace v. ACR Industries, Inc., 722 F.2d 374 (8th Cir. 1984). The conflicts in the evidence are required to be resolved in Petitioners' favor. This was not done. Instead the panel, with no mention of the standard of review, improperly engaged in a de novo review.

As to the quote by Cooper in respondents' brief, Cooper also stated:

> Such strict limits on the judicial power to control jury verdicts have been developed in large measure because of the preferred position assigned to the jury by Constitution and tradition. The preservation assigned to the jury by the seventh amendment includes the basic division of functions ascribing the task of fact--finding to the jury and the task of lawgiving to the judges". (quoting from Baltimore & C Line v. Redman, 295 U.S. 654, 657 (1935). (At 906)

At 916:

> . . .the vital aspect of jury trial is that the jury be allowed to perform the factfinding part of adjudication. (citing Galloway v. United States, 319 U.S. 372 (1943).

And at 921:

> Traditional respect for the jury and its constitutional benison requires that it be allowed to find whatever facts are reasonably suggested by the evidence. The impossibility of defining reasonableness requires that the scope of freedom be left large.

There was a legally sufficient evidentiary basis for the jury's finding of liability against MFA, Beasley and Griffith under 42 U.S.C. Sec. 1983 under the "joint engagement" test set out by this Court in

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) and Dennis v. Sparks, 449 U.S. 24 (1980). The jury heard the facts--including those facts which the panel omitted in its majority opinion-- and made a rational decision from the sequence of events that the state actor (Jenkins) and the private parties (MFA, Griffith, and Beasley) reached a "meeting of the minds" and were "jointly engaged." Black's concurring opinion in Adickes said "conspiracy" is a factual question for the jury. The sequence of events created a substantial possibility of a conspiracy.

Rule 50 is not a reevaluation of the evidence. If the party has sufficient evidence to survive summary judgment and motions for directed verdict, then the trial court should so rule rather than take a "wait and see" attitude on the verdict and then if the trial court does not agree

with the verdict, rule "insufficiency of the evidence". The standard of review cannot be ignored because to do so impermissibly invades the province of the jury.

At the very least this Court should grant a new trial to permit the admission of the evidence of "pattern and practice". To affirm this egregious finding is to take yet another step away from a meaningful "trial by jury".

Petitioners have no other avenues to see justice served. MFA abused the court system, violated constitutional rights, and got off scott-free. Justice has not been served in this case but has been subverted.

CONCLUSION

For the foregoing reasons and for those stated in the Petition Petitioners reiterate their request for relief.

Respectfully submitted,

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